No. 96-1584-CSY Title: Terry Campbell, Petitioner
v.
Louisiana

Docketed: April 8, 1997 Court: Court of Appeal of Louisiana, Third Circuit

Entry	Date	Proceedings and Orders
	Apr 4 1997	Petition for writ of certiorari filed. (Response due May 8, 1997)
	May 5 1997	Waiver of right of respondent Louisiana to respond filed.
	May 13 1997	DISTRIBUTED. May 29, 1997
	May 23 1997	Response requested. (Due June 23, 1997)
	Jun 20 1997	Brief of respondent Louisiana in opposition filed.
	Jul 2 1997	REDISTRIBUTED. September 29, 1997
	Sep 29 1997	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 20, 1997. **********
	Nov 7 1997	Order extending time to file brief of petitioner on the merits to and including November 19, 1997. This brief is to be filed with the Clerk and served upon opposing counsel on or before 3 pm, November 19, 1997. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 pm, December 19, 1997. A reply brief, if any, is to be filed with the Clerk and served upon respondent on or before 3 pm, Monday, January, 5, 1998. Rule 29.2 does not apply.
	Nov 18 1997	Joint appendix filed.
	Nov 18 1997	Brief of petitioner Terry Campbell filed.
	Nov 19 1997	Brief amicus curiae of Association of Criminal Defense Lawyers filed.
	Nov 20 1997	Motion of the parties to expand the record filed.
	Nov 24 1997	Record filed.
	Nov 26 1997	Motion of the parties to allow into the record a joint stipulation of counsel filed.
	Dec 1 1997	DISTRIBUTED. December 1, 1997 (Page 13)
	Dec 8 1997	Motion of the parties to expand the record GRANTED.
	Dec 8 1997	DISTRIBUTED. December 12, 1997 (Page 17)
	Dec 10 1997	CIRCULATED.
	Dec 15 1997	Motion of the parties to allow into the record a joint stipulation of counsel GRANTED.
	Dec 17 1997	Brief of respondent Louisiana filed.
	Jan 20 1998	ARGUED.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA

Respondent.

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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1.a. Whether a white defendant has standing to object to the race-based exclusion of grand jury foremen on Equal Protection grounds even if defendant is not of the same race as the excluded grand jury foremen?

b. Whether a white defendant has standing to raise the due process claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution?

c. Whether a white defendant has standing to raise the fair cross-section claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

2.a. Whether a criminal defendant's Fifth Amendment and *Miranda* rights are violated by law enforcement officers who obtained statements when: 1) the officers have been ordered by the court not to question defendant, 2) the court appoints an attorney for defendant and informs the officers of such and they failed to inform defendant, 3) defendant asserts his right to remain silent, and 4) defendant does not and can not waive his right to remain silent?

2.b. Whether a criminal defendant's Sixth Amendment rights to an attorney are violated by law enforcement officers who obtained statements when: 1) the officers have been ordered by the court not to question defendant, 2) the court appoints an attorney for defendant and informs the officers of such and they failed to inform defendant, 3) defendant asserts his right to remain silent, and 4) defendant does not and can not waive his right to remain silent?

3.a. Whether Louisiana Code of Criminal Procedure, Article 648A which requires criminal prosecution to resume unless the court determines that there is clear and convincing evidence that the defendant has mental capacity to proceed violates the ruling of the United States Supreme Court in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996)?

3.b. Was defendant's due process rights violated when defendant was found guilty despite the overwhelming evidence of insanity at the time of the crime?

4. Whether a criminal defendant is deprived of due process rights when his conviction is obtained based on jury instructions which did not require defendant to have criminal intent at the time of the criminal acts?

5. Whether a criminal defendant's due process rights are violated when a trial court gives the jury a definition of manslaughter so incomplete that it could not adequately consider that as a responsive verdict?

LIST OF PARTIES

Terry Campbell is the Petitioner. He appears herein through retained counsel, Richard V. Burnes, 711 Washington Street, Alexandria, Louisiana 71301-8030, (318) 442-4300.

Respondent is the State of Louisiana through Attorney General Richard P. Ieyoub, 301 Main Street, Sixth Floor, One American Place, Baton Rouge, Louisiana, 70801, (504) 342-7013, and/or District Attorney Brent Coreil, Post Office Drawer 780, Ville Platte, Louisiana 70586, (318) 363-3438.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS, JUDGMENTS, AND ORDERS BELOW

The unpublished judgment rendered by the Louisiana Supreme Court is included in the appendix to this petition, beginning at page A-1. The published opinion of the Louisiana Supreme Court is reported at *State v. Campbell*, 95-0824 (La. 10/2/95); 661 So.2d 1321, and is included in the appendix to this petition beginning at page A-2. The published denial of rehearing by the Louisiana Supreme Court is reported at *State v. Campbell*, 95-0824 (La. 11/3/95); 661 So.2d 1374, and is included in the appendix beginning at page K-1. The published ruling by the Louisiana Supreme Court is cited as *State v. Campbell*, 96-1785 (La. 1/10/97); 685 So.2d 140, and is included in the appendix beginning at page B-1.

The published opinion of the Louisiana Court of Appeal, Third Circuit, is reported at *State v. Campbell*, 94-1140 (La.App. 3 Cir. 3/1/95); 651 So.2d 412, and is included in the appendix beginning at page D-2. The published opinion of the Louisiana Court of Appeal, Third Circuit, is reported at *State v. Campbell*, 94-1140 (La.App. 3rd Cir 3/13/96); 673 So.2d 1061, and is included in the appendix beginning at page E-2. The unpublished denial of rehearing by the Louisiana Court of Appeal, Third Circuit, is cited as *State v. Campbell*, 94-1140 (La. 6/7/96), and is included in the appendix beginning at page L-1.

The unpublished transcript of the denial of defendant's *Motion for New Trial* in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page J-1. The unpublished Judgment denying defendant's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page H-1. The unpublished transcript of the hearing on Defendant's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page G-1.

JURISDICTION

The Louisiana Supreme Court rendered judgments sought to be reviewed in this case on October 2, 1995, and on January 10, 1997. The Louisiana Supreme Court denied defendant's timely application for rehearing with respect to the first judgment in an order dated November 3, 1995. 28 U.S.C. § 1257 confers on this Court jurisdiction to review on writ of certiorari the judgment of the Louisiana Supreme Court. Louisiana Attorney General Richard P. Ieyoub has been notified and served a copy of this *Petition for a Writ of Certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes involved can be found in the appendix to this petition beginning at page M-1:

The Fifth Amendment to the Constitution of the United States
The Sixth Amendment to the Constitution of the United States
The Fourteenth Amendment to the Constitution of the United States
28 U.S.C. § 1257
Louisiana Code of Criminal Procedure, Article 8
Louisiana Code of Criminal Procedure, Article 413
Louisiana Code of Criminal Procedure, Article 648
Louisiana Code of Criminal Procedure, Article 652
Louisiana Revised Statute 14:30
Louisiana Revised Statute 14.30.1
Louisiana Revised Statute 14.31

STATEMENT OF THE CASE

The Louisiana Supreme Court has decided important questions of federal law that have not been, but should be, settled by this Court. The decisions by the Louisiana Supreme Court conflict with the relevant decisions of this Court in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), and in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Additionally, the decisions by the Louisiana Supreme Court conflict with the decisions of the United States Court of Appeals, Eleventh Circuit, in *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), and in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984). Further, the United States Court of Appeals, Fifth Circuit, has entered a decision in *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983) which conflicts with the decisions of United States Court of Appeals, Eleventh Circuit, in *Bowen* and *Sneed*.

From the beginning, defendant, Terry Campbell, a white man, has objected that the indictment charging him was constitutionally defective. Defendant asserted that the grand jury foreman selection process *as applied* in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clause and also violated defendant's due process and fair cross-section rights. It is uncontested by the state and acknowledged by the trial judge that the prior thirty-five grand jury foremen selected over a sixteen and a half year period had all been white. On this issue, the very narrow question presented to this Court is whether a white criminal defendant has standing to raise equal protection claims and due process/fair cross-section claims when blacks are systematically excluded from selection as grand jury foremen.

The trial court denied defendant's *Motion to Quash Grand Jury Indictment* holding that defendant had no standing to raise race-based constitutional claims because defendant is white. On appeal, the Louisiana Court of Appeal, Third Circuit, rendered a judgment overturning the trial court's ruling that defendant had no standing to raise race-based constitutional claims. Without addressing defendant's other claims on appeal, the Louisiana Court of Appeal remanded the case with instructions to have a hearing and make a determination whether the grand jury foreman selection process in Evangeline Parish violated defendant's constitutional rights. However, the Louisiana Supreme Court granted the state's writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit, holding that a white defendant had no standing to raise race-based constitutional claims. Defendant then filed a Petition for Writ of Certiorari to this Court. The state, in its *Brief in Opposition* argued primarily that defendant's petition was premature. This Court denied defendant's writ on May 13, 1996, in

docket number 95-1240, without comment whether the denial was on the merits or because the petition was premature.

The Louisiana Court of Appeal, Third Circuit, and the Louisiana Supreme Court have since ruled on defendant's remaining issues on appeal and the case is now ripe for hearing by this Court.

Of the remaining issues now ruled upon, defendant raises four for review by this Court. Defendant objects to the use of statements obtained from him in violation of his Fifth Amendment right to remain silent and Sixth Amendment right to counsel. Said statements were obtained by law enforcement officers after they had been specifically ordered by the trial court not to question defendant.

Defendant was further denied due process of law when the trial court applied an unconstitutionally high standard and held that defendant was competent to stand trial and later ruled that defendant did not prove by a preponderance of the evidence that he was legally insane at the time of the killing.

Defendant was also denied due process of law when the trial court gave the jury improper instructions which did not require that criminal intent exist at the time of criminal acts.

Finally, defendant was denied due process of law and his Sixth Amendment right to a fair trial when the trial court gave the jury an inadequate definition of manslaughter.

I. BACKGROUND

Defendant, Terry Campbell, suffered a head injury on August 6, 1986, resulting in the physical destruction and surgical removal of portions of his brain. Defendant was arrested on January 11, 1992. Shortly thereafter, an indictment alleging one count of second degree murder was returned against defendant by a grand jury which was selected in an unconstitutional manner.

Defendant was arrested at Cypress Mental Hospital in Lafayette, Louisiana, booked into the Lafayette Parish jail and transported back to the Evangeline Parish jail by Police Chief Deshotel and Deputy Aucoin. Both officers had been specifically ordered by the trial court to not question defendant. Both officers

were aware that defendant had a mental defect. Yet during the approximately hour long ride back to Evangeline Parish, the officers carried on a conversation with defendant even after defendant had invoked his *Miranda* rights. The officers obtained statements from defendant which formed the cornerstone of the state's case.

The underlying problem in this case is defendant's mental condition and defect. In 1986, defendant suffered a serious head injury which necessitated surgery and excision of part of his brain. As a result, defendant's physical injury produced symptoms including loss of memory, headaches, and seizures. Defendant's treating physicians labeled his resulting mental defect as organic brain syndrome and explained that defendant could not think straight or in a reasonable way. The evidence adduced at trial showed that the experts produced by defendant were all very familiar with defendant's medical condition. The experts produced by the state agreed that defense experts would be in a better position to evaluate defendant. Despite the evidence adduced at trial, both the jury and the trial court ruled that defendant was not insane at the time of the killing.

II. PRIOR RULINGS

A hearing was held on December 2, 1993, on defendant's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court before the Honorable Preston M. Aucoin, District Judge. Said motion and hearing raised the issues of constitutional defects in the indictment relating to the grand jury foreman selection process as applied in Evangeline Parish. Defendant argued both his equal protection claim and his due process/fair cross-section claim. The transcript of the hearing is included in the appendix beginning at page G-1. In the judgment rendered on December 2, 1993, and signed on December 6, 1993, the Honorable Preston N. Aucoin denied defendant's motion to quash. The judgment is included in the appendix beginning at page H-1. The trial Judge held that defendant had no standing to raise race-based constitutional claims because defendant is white. In ruling, the trial Judge stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant, Campbell. Again I am restricting all of my comments to this one particular case that we're here on this morning.
>
> This Court rules that the Defendant, Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant, Campbell, has no standing to raise that issue. That being the case the court need not consider other issues. The Motion to Quash the indictment is denied.

See the appendix at page G-37.

The defendant contemporaneously objected to the trial Judge's ruling. See the appendix at page G-38.

Trial on the merits began on December 6, 1993, and ended in mistrial on January 12, 1994. Re-trial began on May 9, 1994. The jury returned a verdict of guilty of second degree murder against defendant on May 12, 1994.

Prior to sentencing, defendant timely filed a *Motion for New Trial* wherein defendant again raised the issue of his indictment which was returned by an unconstitutionally selected grand jury. The *Motion for New Trial* is included in the appendix beginning at page I-1. The motion was denied. The transcript of the denial of the *Motion for New Trial* is included in the appendix beginning at page J-1.

Defendant, in his appeal to the Louisiana Court of Appeal, Third Circuit, urged eleven assignments of error. The *Assignments of Error* filed by defendant in his appeal is included in the appendix beginning at page N-1. Assignment of error number one asserted that:

> [t]he trial court erred in overruling the Motion to Quash Grand Jury Indictment because Defendant was charged with a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected and that the grand jury foreperson selection

process in Evangeline Parish was discriminatory and in violation of Louisiana and United States Constitutional Provisions.

In defendant's brief and at oral argument, defendant raised both his equal protection and due process/fair cross-section claims.

The state neither filed a brief in the appeal nor appeared for oral argument.

Without addressing the other issues raised by defendant, the Louisiana Court of Appeal, Third Circuit, rendered a judgment dated March 1, 1995, overturning the trial court's ruling that defendant had no standing to raise race-based constitutional claims because defendant was white. The opinion of the Louisiana Court of Appeal, Third Circuit, is included in the appendix beginning at page D-2. The Court of Appeal remanded the case to the Thirteenth Judicial District Court with instructions to have a hearing and make a determination whether the grand jury foreman selection process in Evangeline Parish violated defendant's constitutional rights.

The state prepared and filed an *Application for Writ of Certiorari or Review to the Court of Appeal, Third Circuit* with the Louisiana Supreme Court. The defendant prepared and filed an *Opposition to Application for Writ of Certiorari or Review*. The Louisiana Supreme Court granted the state's writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit. The judgment and opinion rendered by the Louisiana Supreme Court is included in the appendix beginning at page A-1. The Louisiana Supreme Court held in its opinion that a white defendant had no standing to raise race-based constitutional claims:

> Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not one of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that if discrimination in the appointment of an individual to that post

> significantly invades the distinctive interest of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. . . . Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

See the appendix at page A-9.

At this point, defendant was faced with a dilemma. Because the Louisiana Court of Appeal, Third Circuit, and subsequently the Louisiana Supreme Court had only ruled on one issue, it was unclear whether that one issue would then be ripe for review by the United States Supreme Court. Out of an abundance of caution, defendant prepared and filed an *Application for Writ of Certiorari* with this Court raising the single issue of the grand jury foremen selection process. The state, through the office of the Attorney General, filed a *Respondent's Brief in Opposition to Petition for Writ of Certiorari* arguing primarily that defendant's application for writ was premature based on *Flynt v. Ohio*, 451 U.S. 619, 101 S.Ct. 1958, 68 L.Ed.2d 489, (1981) and *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 328, (1975). This Court denied defendant's writ on May 13, 1996, in docket number 95-1240, without comment whether the denial was on the merits or because the petition was premature. See the appendix at page C-1.

Subsequently, on March 13, 1996, the Louisiana Court of Appeal, Third Circuit, ruled on defendant's remaining issues on appeal, some of which are raised in this *Petition for a Writ of Certiorari*. See appendix at page E-1. The Louisiana Court of Appeal, Third Circuit, also denied defendant's Application for Rehearing on June 7, 1996. See appendix at page L-1.

The Louisiana Supreme Court, in a decision dated January 10, 1997, denied defendant's writ. See the appendix at page B-1.

Defendant has exhausted state remedies and the case is now ripe for hearing by this Court.

Defendant has raised the issues of discrimination in the grand jury foreman selection process at all stages starting with a pre-trial *Motion to Quash Grand Jury Indictment*, and by raising

the issue in a timely *Motion for New Trial*, and by urging an assignment of error in his appeal to the Louisiana Court of Appeal, Third Circuit, and in his reply to the state's application for writ to the Louisiana Supreme Court. Defendant has at all times preserved this issue. Similarly, defendant has continually raised and preserved the remaining four issues in this application for writ.

REASONS FOR GRANTING CERTIORARI

This case involves constitutional issues of substantial importance to criminal jurisprudence which this Court has not addressed and which the Louisiana Supreme Court has decided in a way that conflicts with relevant decisions of this Court. In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), this Court held that a black criminal defendant is deprived of his due process and equal protection rights when there was a systemic exclusion of blacks from the grand jury that indicted him and the petit jury that convicted him. And in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), this Court held that under the equal protection clause, a criminal defendant may object to race-based exclusions of petit jurors through preemptory challenges whether or not the defendant and the excluded jurors share the same race.

Further, the decision by the Louisiana Supreme Court directly conflicts with the decisions entered by the United States Court of Appeals, Eleventh Circuit. And finally, there is a split in the circuits on this issue. The United States Court of Appeals, Fifth Circuit, has entered a decision which directly conflicts with the decisions entered by the Eleventh Circuit.

The Louisiana Supreme Court ruled that a defendant does not have standing to bring an equal protection claim challenging exclusion of blacks from serving as grand jury foremen when the defendant is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. *State v. Campbell*, 95-0824, p. 4 (La. 10/2/95); 661 So.2d 1321, 1324. The United States Supreme Court has not ruled on the precise question of whether a white defendant has standing to object on equal protection grounds to the exclusion of blacks as grand jury

foremen. However, in *Powers* the United States Supreme Court held that "a defendant in a criminal case can raise the third-party equal protection claims of [petit] jurors excluded by the prosecution because of their race." *Powers*, 499 U.S. at 415, 111 S.Ct. at 1373.

The Louisiana Supreme Court further ruled that, under *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), a white defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen because the role of the grand jury foreman in Louisiana is ministerial. *State v. Campbell*, 95-0824, p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324. That holding by the Louisiana Supreme Court misapplies the holding and reasoning of *Hobby*. The United States Supreme Court distinguished the case of *Rose v. Mitchell*, stating that:

> Moreover, *Rose* must be read in light of the method used in Tennessee to select a grand jury and its foreman. Under that system, 12 members of the grand jury were selected at random by the jury commissioners from a list of qualified potential jurors. The foreman, however, was separately appointed by a judge from the general eligible population at large. The foreman then served as "'the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members there-of.'" *Rose v. Mitchell, supra*, at 548, n. 2, 99 S.Ct., at 2996, n. 2 (quoting Tenn. Code Ann. § 40-1506 (Supp.1978)). The foreman selection process in *Rose* therefore determined not only who would serve as presiding officer, but also who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion. Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed.Rule Crim.Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. **So long as the grand jury**

> **itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process.**

Hobby v. United States, 468 U.S. at 347-48, 104 S.Ct. at 3098. (Emphasis added.)

In *Hobby*, the federal grand jury foreman is selected from a properly constituted grand jury. The selection process in Evangeline Parish is similar to that used *Rose*. Pursuant to Louisiana Code of Criminal Procedure, Article 413:

> the grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors selected or drawn from the grand jury venire. In parishes other than Orleans, the *Court shall select one person from the grand jury venire to serve as foreman of the grand jury*. The Sheriff shall draw indiscriminately by lot from the envelope containing the remaining names of the grand jury venire a sufficient number of names to complete the grand jury. (Emphasis added.)

As in *Rose*, the Louisiana trial judge selects one voting member of the grand jury. And the discrimination in the selection of the foreman distorts the composition of the resulting grand jury thereby tainting the whole.

Therefore, the reliance by the Louisiana Supreme Court on *Hobby* is inappropriate in light of the above distinction drawn by the United States Supreme Court between *Hobby* and *Rose*.

The decision by the Louisiana Supreme Court that a white defendant has no standing to raise the equal protection claim that blacks were excluded from selection as grand jury foreman is also in conflict with decisions by the United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984), *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), *United States v. Holman*, 680 F.2d 1340, (11th Cir. 1982), and *United States v. Perez-Hernandez*, 672 F.2d 1380, (11th Cir. 1982) (per curiam). The United States Court of Appeals, Eleventh Circuit, has steadfastly ruled that the fact that the defendant is not a member of the underrepresented group does not deprive him of standing to

bring a claim of denial of equal protection and exclusion of other groups from serving as grand jury foremen even though he was not of that race (or gender).

The decisions by the United States Court of Appeals, Eleventh Circuit, conflict with the decision entered by the United States Court of Appeals, Fifth Circuit, in *United States v. Cronn*, 717 F.2d 164 (1983). There, the Fifth Circuit, held that "equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the judicial process as it is applied to him." *United States v. Cronn*, 717 F.2d at 169.

Alternatively, this Court should grant certiorari to address the issue that the Louisiana law on present sanity (capacity to proceed), Code of Criminal Procedure, Article 648A, is the standard held unconstitutional by this Court in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996).

ARGUMENT

I. HISTORY OF TOTAL EXCLUSION OF BLACKS AS GRAND JURY FOREMEN

Defendant, prior to the trial on the merits in his case, filed a *Motion to Quash Grand Jury Indictment* wherein he objected that the indictment against him was constitutionally defective in that the manner of selection of grand jury foremen was illegal. More specifically, defendant asserted that the grand jury foreman selection process as applied in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clauses of both the United States Constitution and the Louisiana Constitution. Additionally, defendant argued that the grand jury foreman selection process violated his due process and fair cross-section rights guaranteed by the United States Constitution and the Louisiana Constitution.

For a period from January of 1976 through August of 1993, thirty-five white grand jury forepersons had been selected in Evangeline Parish where approximately twenty-three percent of the registered voters were black. Defendant's evidence covered a

sixteen and a half year period. In *Guice v. Fortenberry*, 722 F.2d 276, 280 (5th Cir. 1984), and *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991), the period of time that the United States Court of Appeals, Fifth Circuit, found relevant was fifteen years.

At the hearing held on December 2, 1993, defendant introduced evidence establishing proportions of blacks in Evangeline Parish for the prior sixteen and one-half year period. Defendant's population statistics were taken from the registered voter lists of Evangeline Parish for 1976 through 1993. Defendant's data is summarized as follows:

Date	Total	White	Black	Blacks as a % of Total
3/31/76	20,059	15,749	4,310	21.49
3/31/77	20,309	15,958	4,351	21.42
3/31/78	19,671	15,455	4,216	21.43
3/31/79	20,097	15,732	4,365	21.72
3/31/80	21,818	17,093	4,725	21.66
3/31/81	21,592	16,907	4,685	21.70
3/31/82	20,938	16,347	4,561	21.93
3/31/83	21,499	16,722	4,777	22.22
3/31/84	22,266	17,139	5,124	23.01
3/31/85	21,446	16,391	5,048	23.54
3/31/86	21,123	16,120	5,003	23.69
3/31/87	21,726	16,501	5,220	24.03
3/24/88	21,542	16,287	5,251	24.38
4/01/89	21,192	15,882	5,300	25.01
3/09/90	21,274	15,888	5,376	25.27
2/15/91	21,963	16,469	5,480	24.95
3/31/92	21,817	16,270	5,532	25.54
2/12/93	21,920	16,390	5,511	25.51

Defendant established that during the period, no black person had ever been selected as a grand jury foreman. It was uncontested at the December 2, 1993, hearing and in all subsequent proceedings that the prior thirty-five grand jury foremen over a sixteen and one-half year period had all been white. **This fact was**

admitted not only by the state but also acknowledged by the trial judge.

The fact that zero grand jury foremen were black is compelling. "While 'statistics are not, of course, the whole answer, . . . nothing is as emphatic as zero.'" *Johnson v. Puckett*, 929 F.2d 1067, 1073 (5th Cir. 1991)(quoting *Guice v. Fortenberry*, 661 F.2d 496, 505 (5th cir. 1981)(en banc), quoting *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969)). The chances of randomly picking a white person thirty-five consecutive times given the population distribution of Evangeline Parish is less than one in ten thousand.

Equal Protection Violation

The United States Supreme Court initially set out a three step test to determine whether a defendant establishes a *prima facie* case of discrimination in an equal protection claim in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). And in *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the United States Supreme Court applied the three step process for establishing a *prima facie* case of discrimination in the context of grand jury foreman selection:

> That is, "in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda v. Partida*, 430 U.S., at 494, 97 S.Ct., at 1280. Specifically, respondents were required to prove their prima facie case with regard to the foreman as follows:
>
> > "The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreman], over a significant period of time. . . . This method of

> proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." *Ibid.*
>
> Only if respondents established a prima facie case of discrimination in the selection of the foreman in accord with this approach, did the burden shift to the State to rebut that prima facie case. *Id.*, at 495, 97 S.Ct., at 1280.

Rose v. Mitchell, 443 U.S. at 565, 99 S.Ct. at 3005.

In *Rose*, the United States Supreme Court held that racial discrimination in the selection of grand jury foremen violates the Fourteenth Amendment to the United States Constitution and requires reversal of a state conviction. In fact,

> where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, [the Supreme Court] uniformly has required that the conviction be set aside, and the indictment returned by the unconstitutionally constituted grand jury be quashed.

Rose v. Mitchell, 443 U.S. at 551, 99 S.Ct. at 2998 (citations omitted). "[S]uch discrimination compels voiding the indictments and convictions." *Guice v. Fortenberry*, 722 F.2d 276, 282 (5th Cir. 1984).

Although earlier jurisprudence was less than clear on the issue, the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), clarified that a criminal defendant does have standing to bring an equal protection claim where the issue raised is the rights of others excluded from participation in the judicial process. *Powers* held that, in the context of peremptory challenges of petit jurors, under the equal protection clause, a criminal defendant has standing to objection to race-based exclusions whether or not the defendant and those excluded share the same race.

A reading of the transcript of the argument at the December 2, 1993, hearing and of the trial court's ruling shows that the trial court improperly relied upon the federal case of *Hobby v. United*

States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), in reaching its holding that defendant had no standing to raise his constitutional claims.

Defendant also has standing to raise his due process/fair cross-section claims. Defendant's race is irrelevant in deciding whether he has been denied fundamental fairness as guaranteed to him by the due process clause. The other question here is whether the composition of the grand jury met the Sixth Amendment's fair cross-section requirements when one member of the grand jury was selected in a discriminatory manner.

The first step of the *Castaneda* test is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or as applied. *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. The confusion on the issue of standing in the state's argument and the trial court's ruling arises from its misidentification of the term "group." The state contends that "group" includes the defendant. The ruling by the Louisiana Supreme Court is also based in part on this same misidentification. In many of the early equal protection cases such as *Castaneda v. Partida* and *Rose v. Mitchell*, often the defendant was a member of the same minority group that was being excluded in some manner. In *Castaneda v. Partida,* the excluded group and the defendant were Mexican-American; in *Rose v. Mitchell* the excluded group and the defendant were black. The Authors of those opinions, therefore, had no reason to draw a distinction between the race of the criminal defendant and the race of the excluded class. But as *Powers* points out, the essence of this type of third party claim is that the rights of the excluded class are being raised by the criminal defendant. When analyzed properly, the "group" referred to is that of the excluded class, in this case blacks excluded as grand jury foremen in Evangeline Parish. The United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (1984), had no problem in recognizing that the defendant need not be a member of the underrepresented or excluded group when raising an equal protection claim of discrimination in the selection process of grand jury foremen.

The group excluded from selection as grand jury foremen is blacks. This is a group that is "a recognizable, distinct class,

singled out for different treatment under the laws, as written or as applied." *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. As the United States Court of Appeals, Fifth Circuit, has already noted, "[b]lacks compromise a distinct class capable of being singled out for different treatment under the laws." *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991). Indeed, in *James v. Whitley*, 39 F.3d 607, 609 (5th Cir. 1994), a case involving issues similar to the case *sub judice*, the state conceded that the petitioner had established that blacks are a recognizable distinct class that receives different treatment under the laws as written or applied.

In its analysis in *Powers*, the United States Supreme Court noted that the discriminatory use of preemptory challenges causes the defendant cognizable injury and he has a concrete interest in challenging the practice because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. Second, the relationship between the defendant and excluded jurors is such that the defendant is fully as effective a proponent of their rights as they themselves would be since both have a common interest in eliminating racial discrimination from the courtroom and there can be no doubt that the defendant will be a motivated, effective advocate because proof of a jury selected in a discriminatory manner may lead to the reversal of the conviction under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Third, it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his own rights. Thus, the fact that a criminal defendant's race differs from that of the excluded jurors is irrelevant to his standing to object to the discriminatory use of preemptorys.

Identical logic applies to the present defendant's claim of discrimination in selection of grand jury foremen. First, the defendant here is caused a cognizable injury when discrimination in selection of grand jury foremen casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. The defendant here has the concrete interest in challenging such a practice. Secondly, the relationship between this defendant and those excluded from selection as grand jury

foremen in Evangeline Parish is identical to the relationship between the defendant in *Powers* and the excluded petit jurors. Both defendants Campbell and Powers would be effective proponents of the rights of the excluded members and both would have a common interest in eliminating racial discrimination in the courtroom. And finally, it is equally as unlikely in the context of the grand jury foreman selection process in Evangeline Parish that a minority excluded from selection as a grand jury foreman would be likely to posses sufficient incentive to set in motion a suit to vindicate his rights.

Therefore, as in *Powers*, the fact that defendant's race differs from that of the excluded members is irrelevant to the analysis of his standing to object to the discriminatory practice in question.

Due Process and Fair Cross-Section Violation

In addition to his equal protection claim, the defendant has raised and continues to raise the issue of violation of the rights guaranteed to him under the due process clauses of the United States Constitution and Louisiana Constitution and the fair cross-section clause of the Sixth Amendment. Defendant asserts that by selecting a grand jury foreman in the discriminatory fashion, the entire grand jury was tainted as a result. *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981)(en banc), echoed the proposition that "[i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination effected only the foreman." *Guice v. Fortenberry*, 661 F.2d at 499. Defendant's races is in no way relevant to his standing to raise these claims. A grand jury chosen in a discriminatory manner can not be said to be unqualified to indict a black man but qualified to indict a white man.

II. ILLEGALLY OBTAINED STATEMENTS

The trial court erred in overruling defendant's written *Motion to Suppress Inculpatory Statements* and *Supplemental Motion to Suppress* and the trial Court erred in ruling during the

course of the trial on defendant's oral *Motion to Suppress Inculpatory Statements* (which was renewed during the course of the trial) and the expanded oral *Motion to Suppress Inculpatory Statements* (which was made on the grounds that the warrant was issued without probable cause).

Defendant, by written motion filed May 28, 1992, entitled *Motion to Suppress Inculpatory Statements*, moved to suppress five separate statements made by defendant to Pine Prairie Chief of Police L. C. Deshotel and Evangeline Parish Sheriff's Deputy Jack Aucoin on January 11, 1992. Defendant alleged as grounds for suppression that said statements were obtained in violation of rights guaranteed to him under the Fifth Amendment of the United States Constitution and his rights under the *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) decision. Additionally, defendant asserts that the statements were taken in direct violation of his rights guaranteed by Article I, section 13 of the Louisiana Constitution of 1974, which mirror those rights of the defendant under the Fifth and Sixth Amendments of the United States Constitution.

Fifth Amendment Violation

The Fifth Amendment of the United States Constitution provides that "no person ... shall be compelled in any criminal case to be a witness against himself." The landmark case of *Miranda v. Arizona*, held that no defendant may be questioned until he has been "read his rights." Among those rights is the right to remain silent.

Defendant was arrested at Cypress Mental Hospital in Lafayette, Louisiana, on January 11, 1992. Defendant was then taken to the Lafayette Parish jail and booked. Immediately thereafter, Police Chief Deshotel and Deputy Aucoin received defendant and transported him back to the Evangeline Parish jail. Both Police Chief L. C. Deshotel and Evangeline Parish Sheriff's Deputy Jack Aucoin testified that the defendant was read his *Miranda* rights prior to the drive back to Evangeline Parish. Deputy Jack Aucoin testified that defendant did indeed invoke his right to remain silent. The statements were obtained during the drive back

to Evangeline Parish after defendant invoked his right to remain silent.

The trial Judge was also the same Judge who signed the arrest warrant and who noted for the record that he specifically ordered the police officers not to question defendant. Deputy Aucoin testified that he heard Police Chief Deshotel's description of defendant as having a mental defect and that he understood the Judge's order to not question the defendant.

Neither Police Chief Deshotel nor Deputy Aucoin testified that the defendant made an explicit oral waiver of his right to remain silent. No written waiver of a right to remain silent was produced or introduced into evidence.

Both Chief Deshotel and Deputy Aucoin were aware or should have been aware that defendant could not make a knowing, intelligent and voluntary waiver of his right to remain silent due to his mental disease or defect. Chief Deshotel testified of knowing of defendant's mental defect. Chief Deshotel specifically told Judge Aucoin about the mental defect in the presence of Deputy Aucoin.

Plainly stated, defendant invoked his right to remain silent. As a result of his physical injury and mental condition the defendant could not have understood, remembered, or waived his constitutional rights at the time the statements were made.

Sixth Amendment Violation

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The United States Supreme Court in *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), *rehearing denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 240, held that a defendant's right to counsel was violated when officers transporting the defendant interrogated the him despite an agreement with the his counsel to not question him. The Sixth Amendment right to counsel is broader than the Fifth Amendment right against self incrimination. Once the defendant has an attorney, the sole contact between the state and the defendant should be through defendant's counsel. In fact, the state has an affirmative duty to not interact

with the defendant except through his counsel.

As part of the arrest warrant, the trial court ordered that attorney Gary Ortego be appointed for defendant immediately. Both Police Chief Deshotel and Deputy Aucoin were aware of the order appointing attorney Gary Ortego to represent defendant. Neither officer took actions to contact Mr. Ortego. In fact, Deputy Aucoin specifically knew how to contact Mr. Ortego and took no steps to do so.

Although the defendant was informed of his right to have an attorney appointed, neither Police Chief Deshotel or Deputy Aucoin informed defendant that an attorney had already been appointed.

Actual Prejudice

The actual prejudice to defendant by the admissions of the five statements obtained in violation of his Fifth and Sixth Amendment rights is manifested by the fact that the statements were the prosecution's evidence connecting the defendant with the scene of the crime. No eyewitness placed defendant at the scene of the crime. Absent such a crucial bit of evidence, the state's case would have collapsed.

The uncontradicted evidence shows that, after invoking his right to remain silent, defendant was confined with law enforcement officers for an extended period in closed quarters and that the officers carried on a conversation with defendant. The United States Constitution requires in such a situation that questioning, of whatever nature, be terminated. Without some intervening event, or period of time, any questioning of or statements by defendant after the invocation of his right to remain silent can not be admissible.

The trial court appointed an attorney for defendant. The trial court specifically advised the law enforcement officers involved that the attorney had been appointed and that they should not question defendant. The trial court could not have made a more explicit statement to the law enforcement officers to refrain from the exact conduct in which they engaged.

III. SANITY

Competency to Proceed

The trial court violated defendant's due process rights when it applied an improper standard to determine whether defendant had capacity to proceed. Whether the trial court applied the standard in the Louisiana Code of Criminal Procedure, Article 648 (criminal prosecution shall be resumed unless the court determines **by clear and convincing evidence** that the defendant does not have the mental capacity to proceed) or the standard enunciated by the Louisiana Court of Appeal, Third Circuit, in its ruling in this case (the defendant bears the burden of proving by a clear preponderance reasonable grounds for the Judge to believe that he is mentally defective . . . . *State v. Vincent*, 338 So.2d 1376 (La. 1976)). Either standard is unconstitutional in light of the subsequent ruling by this Court on April 16, 1996, in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996). Louisiana's rules allow the state to put on trial a defendant who is more likely that not incompetent. Such rules are incompatible with the dictates of due process and were found unconstitutional and unacceptable by this Court in *Cooper*.

Insanity at the Time of the Offense

The second ground asserted in the *Motion for New Trial* and the second ground in the *Motion for Post Verdict Judgment of Acquittal* are that clearly the preponderance of evidence establishes the defense of insanity at the time of the offense-that is, that the circumstances indicate that because of a mental disease or defect the defendant was incapable of distinguishing between right and wrong with reference to the conduct in question.

The jury returned a verdict of guilty of second degree murder and implicitly found defendant to be legally sane. However, the evidence adduced at trial from both experts and lay witnesses called by the defendant, by the state and appointed by the trial court, even when viewed in the light most favorable to the prosecution, shows that no rational finder of fact could have

concluded beyond a reasonable doubt that defendant was more likely that not sane on January 11, 1992. Defendant was legally insane and has been unconstitutionally convicted because the evidence was insufficient to support a finding of guilty as charged.

The state must prove each element of a charged crime beyond a reasonable doubt in order to obtain a conviction. *State v. Noble*, 425 So.2d 734, 735 (La. 1983) citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). An adult defendant successfully rebuts the legal presumption of sanity at the time of the offense when he proves the defense of insanity by a preponderance of the evidence. Louisiana Code of Criminal Procedure, Article 652. Under the *Jackson* standard of the appellate review, *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), adopted by the Supreme Court of Louisiana, *State v. Roy*, 395 So.2d 664, 667 (La. 1981), the evidence when viewed in the light most favorable to the state must show *beyond a reasonable doubt* that the defendant has not established the defense of insanity by a preponderance of the evidence for a conviction to be upheld. *State v. Nealy*, 450 So.2d 634, 639 (La. 1984) (citations omitted); *State v. Price*, 403 So.2d 660, 662 (La. 1981); *State v. Smith*, 461 So.2d 1155, 1158 (La. App. 3rd Cir. 1984).

Proof at Trial

Nine doctors and/or mental health experts provided evidence at the trial. Four of those experts concluded that the defendant was legally insane on January 11, 1992, the date of the shooting. All experts agreed that defendant had a mental defect when they examined him at times ranging from a few days after the killing to as much as a couple of years later. Additionally, all experts agreed that defendant had the same mental defect at the time of the killing.

As a consequence of defendant's injury and the resulting mental effects, defendant was originally found incompetent to assist counsel at trial by Dr. Fontenot, a member of the sanity commission appointed by the trial court. The other member of the sanity commission, Dr. Landry, testified that "I felt that his attorney

might be at a disadvantage in putting up a defense for him based on what, at least in my office, seemed to be pretty profound memory problems." Defendant's injury was not one such that it would get better with time. As Dr. Landry testified defendant's "prognosis was poor based on his organic deficits. Bottom line is that you generally can't fix those sort of damaged brain cells."

That the defendant suffered a physical injury was shown by the testimony at trial of James Fontenot, who was present during the injury to defendant on August 6, 1986, and of Dr. Harper, a neurologist, who had been treating defendant. The fact that there was a physical injury was not disputed by the state.

Defendant's physical injury produced mental defects as described by witnesses for the defense. Dr. Jimmy D. Cole testified about defendant's loss of memory of the original injury. Dr. Cole also described defendant's symptoms as including loss of memory, headaches, and trouble with seizures. Dr. Cole labeled defendant's mental defect as organic brain syndrome. Dr. Cole explained that this meant that defendant can not think straight or think in a reasonable way to solve problems as he did before.

Additionally, Dr. Cole testified that defendant began exhibiting signs of depression. Dr. Cole testified that on January 7, 1992, five days before the killing, defendant came in "as depressed as I have ever seen him." He was despondent, tearful and was again having suicidal feelings.

Dr. Lecorgne described defendant as having "a tendency to become highly emotionally aroused without due regard for the boundaries of external reality, or due regard for the consequences of his behavior." And as having "emotional instability, including swinging from a relatively normal mood to outbursts of aggression or anger that are totally out of proportion to what is going on around him ... Thus, as a consequence of the brain injury it was determined that Mr. Campbell's behavior is subject to sudden and rapid breakdown under conditions of stress and his available coping skills are significantly limited."

On cross-examination by the state, Dr. Lecorgne testified that "what I know about the condition [defendant] has says that once his arousal, if indeed this is exactly what happened, once that arousal of emotions and behavior occurred he was like a run away

locomotive with no ability to control, restrain, or stop himself and that is what my test showed and that is what is very comforting and reassuring to hear a medical doctor's films corroborate."

Dr. Cloyd testified that "such people are especially vulnerable to physical or psycho-social stresses, problems this and often with immaturity-emotional immaturity in handling things."

Dr. Paul Ware testified that "there is absolutely no question and I have not heard anyone disagree with the fact that [defendant] has both a mental disease and a mental defect." Dr. Ware went on to testify that "in my opinion that there is no question that his mental disease or defect did interfere significantly with his ability to determine right from wrong at the time in question and that he did not have the mental ability or capacity to distinguish right from wrong."

Additional weight was given to Dr. Cloyd's and Dr. Ware's testimony when they testified that in all of their past examinations they have rarely found a defendant to be legally insane. Dr. Cloyd testified that he has evaluated people over 100 times to see if they meet the legal definition of insanity and this is only the second time that he has ever found that someone could not tell right from wrong. Dr. Ware testified that of the approximately 2,500 sanity commission evaluations he has been on, the percentage that he felt was not guilty by reason of insanity has been less than one percent.

No expert examining defendant found any deception on his part. Testifying on behalf of the defense, Dr. Cole said that he believes defendant was being truthful about the accident and his symptoms. Dr. Lecorgne testified that defendant was being truthful with him, and that there was no malingering or conscious deception involved. Dr. Cloyd testified that he found no evidence even suggestive of malingering.

This conclusion was supported by the experts who testified on behalf of the state. Dr. Gibson said that defendant certainly seemed credible and that he (Dr. Gibson) believed defendant. No expert witness testified that they believed defendant to be deceptive or malingering.

Four experts testified on behalf of the state. The first, Dr. Charles Fontenot, a physician, was appointed as a member of the sanity commission. Dr. Fontenot originally recommended that

defendant not stand trial "because of his mental incompetence." Although Dr. Fontenot testified that the thought defendant was legally sane, he went on to testify that he does not know what the legal definition of sanity is. Dr. Landry, a physician and specialist in psychiatry, was appointed as the second member of the sanity commission. Dr. Landry testified that defendant had significant defects and a brain injury.

Additionally, the state appointed two experts to examine defendant shortly before trial. Dr. Gibson, a psychiatrist, testified that defendant certainly had a mental disease and/or defect and very likely the mental disease and the defect. The state's final expert witness, Dr. Pennington, an M.D. that specializes in psychiatry, did not even conclusively testify that defendant knew the difference between right and wrong on January 11, 1992.

All of the state's experts who were asked which doctors would be in the best position to evaluate defendant testified that those doctors who had treated defendant before and after the killing and at the time of the killing were in the best position to evaluate him. Dr. Landry testified that he thought Dr. Cole would know defendant than him (Landry). Dr. Landry testified that he only saw defendant one time and that was six months after the killing. Dr. Landry testified that he never saw Dr. Cole's records or Cypress Hospital's records. Dr. Gibson testified that his determination of sanity based on an examination on November 15, 1993, would be much more difficult than a determination based on an examination at the time of the killing. Dr. Gibson testified that he only examined defendant for two hours and did not conduct his examination until about November 15, 1993, eighteen months afterwards. Dr. Gibson testified that it is better to examine someone as close as possible to the time of occurrence of the event which is in question. Dr. Pennington testified that defendant's treating team consisting of Dr. Cole and Dr. Cloyd would be in a better position to determine defendant's mental condition on January 11, 1992, than he would be. Dr. Pennington additionally testified that his examination only consisted of a one-on-one interview lasting about an hour and fifteen minutes on November 17, 1993.

A defendant is denied due process of law if the trior of fact is "free to find the defendant guilty even when he proves insanity

by preponderance of the evidence." *State v. Roy*, 395 So.2d 664, 667 (La. 1981) (quoting *State v. Poree*, 386 So.2d 1331, 1335 (La. 1980)). The evidence presented at the trial of defendant, when viewed in the light most favorable to the prosecution, was insufficient to show beyond a reasonable doubt that the defendant failed to prove by a preponderance of the evidence that he was legally insane at the time of the shooting. His conviction and sentence on one count of second degree murder violates his due process rights guaranteed to him by the United States Constitution.

On the record of this trial, no rational finder of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was not competent to proceed or that he was insane at the time of the killings.

Only by disregarding in its entirety the testimony of the defendant's witnesses, both lay and experts, and much of the testimony of the witnesses called by the state, in conjunction with application of the unconstitutional higher standards of Louisiana Code of Criminal Procedure, Article 648 and of Louisiana jurisprudence as in *State v. Vincent*, could the jury and trial court reach their conclusions. The defendant was denied due process of law when he was found competent to proceed and because of the trial court's erroneous denial of his *Motion for Post Verdict Judgment of Acquittal*.

IV. LACK OF *MENS REA* AT TIME OF *ACTUS REUS*

The trial court erred when it refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury. Defendant by written motion requested that an instruction be given which would clarify the ambiguity of exactly when the required criminal intent must exist.

Criminal intent must exist **at the time of** the acts or omissions of the defendant. Louisiana Code of Criminal Procedure, Article 8, provides in part that "[c]riminal conduct consists of: (1) an act or a failure to act that produces criminal consequences, and which is combined with criminal intent."

In the instructions to the jury, the trial court in its discussion of intent stated that:

> [w]ith reference to the crime of murder it is immaterial whether the specific intent or premeditation existed for a brief or great length of time before the killing. It is sufficient that it existed only a moment prior to the commission of the act which resulted in the killing. As to murder, the law indicates no definite time within which a specific intent to kill must be formed so as to make the killing murder. The specific intent may have existed a moment antecedent to the act itself which caused the death, or a day or another period of time.

In the trial court's jury instructions, the requirement that the criminal intent must exist at the same time as the acts of the defendant is entirely absent. In fact, the entire discussion by the trial court is couched in the past tense relative to the acts. The first sentence refers to intent existing "for a brief or great length of time *before* the killing.". Emphasis added. The second sentence again refers to intent existing "prior to the commission of the act." The third sentence only indicates that no definite time is required when the intent is formed. And the fourth and final sentence again refers to the intent existing "a moment antecedent to the act ... or a day or another period of time." None of these instructions require the intent to have existed **at the time of the act**. Taken individually or as a whole, these instructions squarely place the criminal intent requirement before the act, not coincident with the act. The Court of Appeal, Third Circuit, ruled that the trial court's instructions were sufficient. However, at no time did the trial court clearly explain the required temporal connection between the required specific intent and the act.

By not requiring the jury to find criminal intent existing at the time of acts which lead to the killing, defendant was convicted in violation of his due process rights.

V. IMPROPER DEFINITION OF CRIME

Defendant asserts that the trial court erred when it overruled defendant's written objections to the proffered general

jury charges. More specifically, the trial court's charge defining R.S. 14:31, manslaughter, was incomplete and inaccurate and referred to "enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1" when the court's general charge did not specify the enumerated or a non-enumerated felonies nor did the court's general charge define the enumerated or non-enumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

The jury was left with only the choice of finding the defendant guilty of the greater charge of second degree murder. The only guilty verdict the jury could adequately consider was guilty of second degree murder. Consequently, defendant was convicted in violation of his due process rights.

CONCLUSION

This Court should grant certiorari to address the conflicts in the decisions by the Supreme Court of Louisiana, the United States Court of Appeals, Fifth Circuit, and the United States Court of Appeals, Eleventh Circuit, concerning whether a white defendant has standing to object to the rase-based exclusion of grand jury foremen on equal protection and due process/fair cross-section grounds even if not of the same race as those excluded as grand jury foremen, and because the ruling of defendant's capacity to proceed was on the basis of Louisiana Code of Criminal Procedure, Article 648A which is clearly unconstitutional under the holding of the United State Supreme Court in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996). Alternatively, this Court should grant certiorari to address other denials of defendant's basic constitutional rights.

Respectfully Submitted,
BURNES & BURNES
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BY: _____

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- And -

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The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 95-K - 0824

TERRY CAMPBELL

- - - - - - - -

IN RE: State of Louisiana; - Plaintiff(s); Applying for writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CR 94-1140, CR94-1140; Parish of Evangeline 13th Judicial District Div. "A" Number 45,690

- - - - - - - -

October 2, 1995

Granted. See per curiam.

CDK
WFM
JCW
HTL
BJJ
JPV

CALOGERO, C.J. not on panel.

DENNIS, J. would deny the writ. The majority's opinion is premature and incomplete inasmuch as it is based on an inadequate record and does not address state constitutional law.

Supreme Court of Louisiana
October 2, 1995

S/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

Oct 2 1995

No. 95-K-0824
State
Versus
Terry Campbell

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA

S/SDK

PER CURIAM.*

WRIT GRANTED. Defendant was indicted for second degree murder. Prior to trial, defendant filed a Motion to Quash Grand Jury Indictment, alleging the grand jury foreman selection process in Evangeline Parish was discriminatory. The motion was denied. Defendant was later convicted of second degree murder. On appeal, one of defendant's assignments of error asserted the trial court had erred by denying his motion to quash on the basis that he, as a white man, lacked standing to claim discrimination against blacks in the selection of grand jury foremen in Evangeline Parish. The third circuit found defendant had standing to pursue the claim, but did not reach the merits of his claim. The court instead found the statistical information compiled by the defense in support of the claim was incomplete and remanded for further evidence to be adduced.[1]

****Calogero, C.J. not on panel. See Rule IV, Part 2, § 3.***

[1]The court of appeal did not address defendant's remaining assignments of error.

Dennis J., would deny the writ. The majority's opinion is premature and incomplete inasmuch as it is based on an inadequate record and does not address state constitutional law.

The state filed a writ application with this Court, arguing the court of appeal erred in finding defendant had standing to make a discrimination claim on behalf of the excluded black potential grand jury foremen and also that the court of appeal erred in

remanding the case to allow the defendant to put on more evidence. We grant the state's writ application, reverse the court of appeal decision, and remand to the court of appeal for further proceedings.

In Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993 (1979), the United States Supreme Court implicitly held two black defendants had standing to bring an equal protection claim that blacks had been unconstitutionally excluded from serving as grand jury foremen when it "assume[d] without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside." *Rose,* Id. at 551, n. 4, 99 S.Ct. at 2998, n. 4. Therefore, "in order to show that an equal protection violation has occurred in the context of grand jury ... foreman ... selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Id. at 565, 99 S.Ct. at 3005 (quoting *Castaneda v. Partida,* 430 U.S. at 494, 97 S.Ct. at 1272). Thus, in the context of an equal protection claim with respect to the selection of a grand jury foreman, *Rose* requires the defendant claiming the violation be of the same "race or identifiable group" as those he alleges were excluded from serving as grand jury foremen.

In Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093 (1984), the Court was faced with determining whether discrimination in the selection of federal grand jury foremen, resulting in the underrepresentation of blacks and women in that position, required reversal of the conviction of a white male defendant. The defendant had argued this discrimination was a violation of his due process right under the Fifth Amendment of the United States Constitution. The Court noted that in *Peters v. Kiff,* 407 U.S. 493, 92 S.Ct. 2163 (1972), a plurality opinion, it had held a person of any race had standing to bring a Due Process Clause claim challenging the exclusion of any group from petit or grand jury service. The *Hobby* Court held that this would not be the case, however, where a defendant was bringing a due process claim challenging the exclusion of a particular group from serving as grand jury foremen.

The Hobby Court held that discrimination in the selection of a grand jury foreman, as opposed from discrimination in the selection of the grand jury itself, did not impede the defendant's due process rights. "[Even] assuming discrimination entered into the selection of federal grand jury foremen, such discrimination does not warrant the reversal of the conviction of, and dismissal of the indictment against, a white male bringing a claim under the Due Process Clause." Id. at 350, 104 S.Ct. at 3099. The Court focused on the fact that the impact of a discriminatorily chosen grand jury foreman, as opposed to the exclusion of certain groups from participation in the petit or grand jury itself, has only an incidental effect on the criminal justice system:

> Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.
>
> Nor does discrimination in the appointment of grand jury foremen impair the defendant's due process interest in assuring that the grand jury includes persons with a range of experiences and perspectives. The due process concern that no "large and identifiable segment of the community [be] excluded from jury service," does not arise when the alleged discrimination pertains only to the selection of a foreman from among the members of a properly constituted federal grand jury. That the grand jury in this case was so properly constituted is not questioned . . . .

> The ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause. Absent an infringement of the fundamental right to fairness that violates due process, there is no basis upon which to reverse petitioner's conviction or dismiss the indictment.

Id. at 345-46, 104 S.Ct. at 3096-97 (citations omitted).
The Court distinguished *Rose* on the basis that it involved an equal protection claim brought by a black defendant claiming discrimination against members of his own race in the selection of the grand jury foreman, as opposed to *Hobby,* where the white defendant brought only a due process challenge.

In this case, defendant alleges violations of both the Equal Protection Clause and the Due Process Clause of the United States and Louisiana Constitutions. The court of appeal in the instant case analogized to *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364 (1991) in support for its holding that a white defendant had standing to bring a due process or equal protection claim attacking the process for selecting grand jury foremen as discriminatory against blacks. In *Powers,* the Court held that a white defendant had standing to raise the equal protection claims of jurors excluded because of their race by the prosecution through the improper use of peremptory challenges. The Court reached this decision after a thorough discussion of the great impact racial discrimination in the selection of jurors would have on the defendant as well as on the integrity of the judicial process. The Court stated:

> The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. This is not because the individual jurors dismissed by the prosecution may have been predisposed to

> favor [or dislike] the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," and places the fairness of a criminal proceeding in doubt.
>
> . . . The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. . . . Active discrimination by a prosecutor during this process [voir dire] condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. . . .
>
> . . . A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case. " The influence of the voir dire process may persist through the whole course of the trial proceedings. If the defendant has no right to object to the prosecutor's improper exclusion of jurors, and if the trial court has no duty to make a prompt inquiry when the defendant shows, by adequate grounds, a likelihood of impropriety in the exercise of a challenge, there arise legitimate doubts that the jury has been chosen by proper means. The composition of the trier of fact itself is called in question, and the irregularity may pervade all the

proceedings that follow.

> The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

Powers, 499 U.S. at 411-13, 111 S.Ct. at 1371-72 (citations omitted).

Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby*, defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. Furthermore, under La. C.Cr.P. art. 436, any grand juror who objects to a rule of procedure made by the foreman may seek review from the court. Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

The United States Supreme Court has not yet addressed

whether a white defendant would have standing to raise the equal protection claims of members of another race who were not selected to serve as grand jury foremen because of their race. Although *Powers* gives to white defendants standing to bring an equal protection claim on behalf of jurors who were excluded from serving on the petit jury because of their race through the improper use of peremptory challenges, that holding was based on the considerable and substantial impact that such obvious discrimination by the prosecutor during voir dire would have on the defendant's trial as well as on the integrity of the judicial system as a whole. The same cannot be said for discrimination in the selection of a grand jury foreman, and we decline to extend *Powers* to such a situation.

The court of appeal erred in holding defendant had standing to bring either the due process or equal protection claims. The case is remanded to the court of appeal for treatment of defendant's remaining assignments of error.

REVERSED AND REMANDED.

REVERSED AND REMANDED.

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. **NO. 96-K - 1785**

TERRY CAMPBELL

- - - - - - - -

IN RE: Campbell, Terry; - Defendant(s); Applying for Writ of certiorari and/or Review; Parish of Evangeline 13th Judicial District Div."A" Number 45,690; to the Court of Appeal, Third Circuit, Number CR94-1140

- - - - - - - -

January 10, 1997

Denied.

CDT
PFC
WFM
HTL
CDK
BJJ
JPV

KNOLL, J. recused; not on panel.
Supreme Court of Louisiana
January 10, 1997

S/Theophile A. Duroncelet
Clerk of Court
For the Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 13, 1996

Mr. Richard V. Burnes
Burnes & Burnes
P.O. Box 650
Alexandria, LA 71301-8030

Re: Terry Campbell
v. Louisiana
No. 95-1240

Dear Mr. Burnes:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
S/William K. Suter
William K. Suter, Clerk

OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
P.O. Box 3000
Lake Charles, La. 70602

Deposited in U.S. Mail
MAR 1 1995

NOTICE OF JUDGMENT

TO ALL COUNSEL OF RECORD:

ATTACHED YOU WILL FIND A COPY OF THE JUDGMENT OF THIS COURT IN A CASE IN WHICH YOU ARE ATTORNEY OF RECORD.

Your attention is invited to Rule 2.18.2 of the Uniform Rules - Courts of Appeal, which regulates applications for rehearing.

Please note also that it is no longer necessary to apply to the Court of Appeal for a rehearing as a prerequisite to applying to the Supreme Court for writs.

Cordially yours,

Kenneth J. deblanc
Clerk of Court

cc: Suit Record

(NOTE: Office hours are 8:30 A.M. to 4:30 P.M. for filings).

Port No. 3543

NO. CR94-1140

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 1 1995

STATE OF LOUISIANA

VERSUS

TERRY CAMPBELL

Appeal from the Thirteenth Judicial District Court, Parish of Evangeline, State of Louisiana, Honorable Preston N. Aucoin, District Judge, presiding.

Before PETERS, AMY and SULLIVAN, Judges.

SULLIVAN, Judge.

Defendant, Terry Campbell, was tried by a jury and found guilty on May 12, 1994, of second degree murder, a violation of La. R.S. 14:30.1. He was sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence. His appeal urges eleven assignments of error. We remand with instructions.

In Assignment of Error Number 1, defendant contends the trial court erred in overruling his Motion to Quash Grand Jury Indictment. The motion alleged that the grand jury selection process in Evangeline Parish is discriminatory and in violation of the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 2; Article I, Section 15; and Article I, Section 16 of the Louisiana Constitution. A hearing on defendant's

motion was held on December 2, 1993. In denying the motion, the trial judge stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the defendant Campbell. Again I'm restricting all of my comments to this one particular case that we're here on this morning.
>
> This court rules that the defendant Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, defendant Campbell has no standing to raise that issue. That being the case the court need not consider the other issues. The Motion to Quash the Indictment is denied.

The United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991) held that under the Equal Protection Clause, "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race". *Powers*, at 111 S.Ct 1366. It concluded that a white defendant had standing to raise "third-party equal protection claims" of wrongful discrimination.

The state and the defense stipulated to certain facts at the beginning of the hearing in order to avoid having to call the Registrar of Voters as a witness.

However, this was insufficient to make a determination of discrimination in the grand jury selection process. As noted in *State v. Young*, 569 So.2d 570 (La.App. 1 Cir. 1990), *writ denied*, 575

So.2d 386 (La. 1991):

> However, since the general venire in East Baton Rouge Parish is composed of "qualified" persons drawn from a random list of registered voters and licensed drivers in that parish, the total percentage of a particular minority in the general population does not have a direct bearing on the make-up of the general venire, from which the grand jury venire is randomly drawn, and the grand jury foreman is selected. Rather, it is the percentage of the particular minority in the general population who are either licensed drivers or registered voters, **and** who meet the five qualifications necessary to become a juror, which is the appropriate percentage to compare with the actual percentage of minority grand jury foremen.
>
> Therefore, in order to make a prima facie showing of discrimination in the selection of a grand jury foreman, the defendant must show a disproportion over a significant period of time between the percentage of an identifiable minority in the general venire or grand jury venire, and the percentage of minority forepersons during that time; and that the selection process is susceptible of abuse. That is, the defendant must show that the percentage of minority persons in the general population who are qualified to serve as grand jurors is disproportionate to the actual number of minority grand jury forepersons over a significant period of time to establish a prima facie case. (Footnotes omitted.) (Citations omitted.)

Id at 575.

The information initially submitted by the defendant included only data from the voter registration list and several record

extracts showing the composition of local juries, and did not include the comprehensive data on the jury venire as required in *Young, supra.*

The same reasons enunciated in *Powers* should be employed in defendant's case. Although the role of the foreman of the grand jury in Louisiana may be ministerial in nature, a full evidentiary hearing should have been had on the matter and a ruling handed down on defendant's due process and equal protection claims. *State ex rel. Williams v. Whitley,* 629 So.2d 343 (La. 1993).

This court is sympathetic with the trial judge's concerns in this type of challenge. However, we, like he, must comply with established constitutional mandates. It is noteworthy that the U. S. Supreme Court, in *Rose v. Mitchell,* 443 U.S. 545, 99 S.Ct. 2993 (1979), in dealing with a similar situation, i.e., there never having been a black foreman of a grand jury in Tipton County, Tennessee, nonetheless held that defendant failed to present a prima facie case of discrimination.

Exercising our supervisory jurisdiction under Article V, Section 10, Louisiana Constitution, we remand for such a hearing and determination. If the trial court determines that the grand jury selection process in Evangeline Parish violated defendant's constitutional rights, it must quash the indictment. However, if the trial court finds that the selection process is constitutional, the Clerk of Court of Evangeline Parish is ordered to return this case to us, the record supplemented with the hearing and judge's ruling, so that we can complete the appeal process.

REMANDED, WITH INSTRUCTIONS.

OFFICE OF CLERK
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
P.O. Box 3000
Lake Charles, La. 70602

Deposited in
U.S. Mail
MAR 13 1996

NOTICE OF JUDGMENT

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Cordially yours,

Kenneth J. deBlanc
Clerk of Court

cc: Suit Record

(NOTE: Office hours are 8:30 A.M. to 4:30 P.M. for filings).

Port No. 3543

NUMBER CR94-1140

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 13 1996

STATE OF LOUISIANA

VERSUS

TERRY D. CAMPBELL

Appeal from the Thirteenth Judicial District Court, Parish of Evangeline, State of Louisiana, Honorable Preston N. Aucoin, District Judge, presiding.

Before PETERS, AMY and SULLIVAN, Judges.

SULLIVAN, Judge.

This second degree murder case is before this court on remand from the Supreme Court of Louisiana. The defendant, Terry Campbell, was convicted of second degree murder and sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence. He appealed to this court and assigned eleven trial court errors. In our prior opinion, *State v. Campbell, 94-1140* (La.App. 3 Cir. 3/1/95); 651 So.2d 412, we determined that the trial court erred in denying Campbell's motion to quash the indictment on the basis that he, a white man, lacked standing to claim discriminatory treatment of blacks in the selection of grand jury foremen in Evangeline Parish. This court concluded that Campbell had standing to pursue third-party equal protection claims in the context of grand jury foremen selection. We remanded the case to the trial court for a full evidentiary

hearing on the matter.

The state applied for a writ of certiorari to the Supreme Court of Louisiana. On October 2, 1995, the supreme court granted the writ and reversed this court's decision. It determined that Campbell lacked standing to present a discrimination claim on behalf of the excluded black potential grand jury foreman. The supreme court remanded the case to this court for consideration of the defendant's ten remaining assignments of error. *State v. Campbell,* 95-824 (La. 10/2/95); 661 So.2d 1321.

FACTS

Preliminarily, we note that the defendant, Terry Campbell, suffered a head injury on August 6, 1986. As a result, the defendant had a portion of his brain surgically removed. Consequently, the defendant now suffers from organic brain syndrome, chronic pain syndrome and epileptic seizures.

The defendant was separated from his wife, Susan Campbell, on the date of the incident. On January 11, 1992, Susan Campbell was dropped off at her house by James Sharp after a night out with friends. After Mrs. Campbell entered her house, the defendant shot Mr. Sharp through the window of Mr. Sharp's van. Mr. Sharp allegedly tried to run over the defendant in the van. Mr. Sharp tried to drive away from the scene but wrecked his vehicle in a neighbor's yard, where he died at the scene. The defendant was subsequently arrested and charged with second degree murder, in violation of La.R.S. 14:30.1.

Campbell was indicted by a grand jury. On March 6, 1992, defendant appeared in court with counsel for arraignment and entered a plea of not guilty. Defendant thereafter filed a Motion to Change Plea from Not Guilty to Not Guilty by Reason of Insanity. On July 16, 1992, the court granted defendant's motion, rearraigned the defendant, and granted the state's motion to appoint a sanity commission. On January 8, 1993, defendant appeared in court for a sanity hearing. The defense and state agreed to stipulate to

medical reports in lieu of the doctors' testimony. Based on the reports, the court ordered the defendant to be admitted to East Feliciana Hospital for further evaluation.

A second sanity hearing was held on June 11, 1993. Evidence was introduced and arguments were presented. The court determined that the defendant had the capacity to proceed and assist counsel in his defense. The state moved to have two doctors from the East Feliciana Hospital examine the defendant to determine his mental capacity at the time of the offense. The court ordered the state to prepare an order. On November 23, 1993, the defendant orally moved to limit the number of expert witnesses, which motion was denied by the court. On December 2, 1993, the defendant filed a Motion to Quash the Grand Jury Indictment, which motion was denied by the court. Arguments were also heard on defendant's Motion to Suppress Inculpatory Statements, which motion was also denied by the court.

Trial by jury began on December 6, 1993. The defense stipulated that the defendant shot the victim, Mr Sharp. On January 12, 1994, the state and the defendant jointly moved for a mistrial. The trial court granted the motion. A second trial by jury began on May 9, 1994. Defendant re-urged his Motion to Suppress, which motion was denied by the trial court. On May 12, 1994, the jury returned a unanimous verdict of guilty as charged. On May 20, 1994, the defendant was sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence.

As mentioned, Campbell's first assignment of error was found to lack merit by the supreme court. Defendant's remaining assignments of error are as follows:

1. The trial court erred in ruling on the issue of defendant's present capacity to proceed for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him and assist in his defense

remained with him throughout the proceedings and exist to this date.

2. The trial court erred in overruling defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial, and in overruling defendant's oral Motion to Limit Expert Witnesses.

3. The trial court erred in overruling defendant's written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress.

4. The trial court erred in ruling during the course of the trial on defendant's oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause).

5. The trial court erred when it refused to give defense requested jury charges number 2, 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

6. The trial court erred when it refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

7. The trial court erred when it overruled defendant's written objections to the proffered general jury

charges which said objections were tendered to the Court timely in a document entitled "Defense Objections to Proffered General Jury Charges." More specifically, the court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the court's general charge did not specify the enumerated or non-enumerated felonies nor did the court's general charge define the enumerated or non-enumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

8. The trial court erred in failing to sustain defendant's objections to the proffered general jury charges.

9. The trial court erred in overruling defendant's motion for new trial.

10. The trial court erred in overruling defendant's motion for post verdict judgment of acquittal.

Our review of the record reveals that all of Campbell's remaining assignments of error lack merit. Accordingly, for the following reasons, the defendant's conviction and sentence are affirmed.

ASSIGNMENT OF ERROR NO. 1

By this assignment of error, defendant contends the trial court erred in ruling on the issue of defendant's present capacity to proceed for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him and assist in his defense remained with him throughout the proceedings and exist to this date.

Defendant's argument depends on the testimony of Dr. Charles Fontenot, a member of the sanity commission who found the defendant incompetent to assist counsel at trial, and the testimony of Dr. Phillip Landry, who was also on the sanity commission. Dr. Landry concluded "that his attorney might be at a disadvantage in putting up a defense for him based on what ... seemed to be some pretty profound memory problems."

Dr. Fontenot, Coroner of Evangeline Parish, examined the defendant on July 22, 1992. The defendant told Dr. Fontenot that he did not remember the actual shooting but he did remember the events around the shooting, such as the incident happening in his wife's driveway and the victim being in a vehicle. Dr. Fontenot was of the opinion that the defendant understood right from wrong at the time of the incident. Dr. Fontenot testified that because the defendant could not remember the actual shooting, the defendant might have a hard time assisting his attorney. Dr. Fontenot recommended that the defendant not stand trial at that time but that he be hospitalized at a state hospital until such time that they felt his memory had improved to the point where he could stand trial. However, Dr. Fontenot was of the opinion that the defendant knew right from wrong at the time he examined him.

Dr. Landry, a psychiatrist in Opelousas, testified that his examination revealed that the defendant did not remember details of the incident but did "have a vague recollection that someone had attempted to run over him and that some individual had apparently brought his wife home on the night that this incident occurred." Dr. Landry noted that the defendant had driven himself to the office, was appropriately dressed, and did not seem distressed. The defendant had no trouble remembering the three different medications he was taking as well as the different doses. However, Dr. Landry did note that the defendant had a significant impairment of memory. Dr. Landry felt that the defendant understood the nature of the charges against him and could appreciate the seriousness of the charges. As pointed out by the defendant, Dr. Landry felt that an attorney "might be at a disadvantage in putting up a defense for him based on what, at least in the office, seemed

to be some pretty profound memory problems." However, Dr. Landry did state that he felt "that he could go ahead with trial." Dr. Landry was also of the opinion that the defendant had the ability of distinguishing a plea of guilty from a plea of not guilty and was able to maintain a consistent defense and make simple decisions in response to well explained alternatives.

Dr. Richard Gibson, an expert in the field of medicine and psychiatry, examined the defendant at East Feliciana Hospital and also determined that the defendant was capable of standing trial.

The twofold test of mental capacity to stand trial under La.Code Crim.P. art. 641 is set out in *State v. Williams,* 381 So.2d 439 (La.1980). The court must determine (1) whether the accused fully understands the consequences of the proceedings and (2) whether he has the ability to assist in his defense by consultation with counsel. The defendant bears the burden of proving by a clear preponderance reasonable grounds for the judge to believe that he is mentally defective or was at the time of the offense. *State v. Vincent,* 338 So.2d 1376 (La.1976). The final determination of a defendant's competency to stand trial rests with the trial judge and not the medical examiners. It is a legal and not a medical issue. *State v. Qualls,* 377 So.2d 293 (La. 1979). The trial judge's determination of competency to stand trial is entitled to great weight and will not be disturbed on appeal absent a showing of manifest error. *State v. Brown,* 414 So.2d 689 (La. 1982).

The trial court did not commit manifest error in determining that the defendant had the capacity to stand trial. Both members of the sanity commission were substantially in accord. Although Dr. Fontenot recommended that the defendant be hospitalized until his memory improved, he agreed with Dr. Landry that the defendant knew right from wrong at the time of the examination. Although the defendant alleges that he does not remember the facts of the shooting, and this fact if true may somewhat hinder his assistance to counsel, this fact alone should not have prevented the defendant from going to trial.

For the foregoing reasons, we find the trial judge did not err as the defendant failed to meet his burden of proving that he did not have the capacity to proceed to trial. Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

This assignment of error was abandoned by the defendant.

ASSIGNMENTS OF ERROR NOS. 3 and 4

These assignments of error have been combined by the defendant in his brief. Therefore, we will address them together.

By these assignments of error, the defendant contends that the trial court erred in overruling his Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress as well as his oral Motion to Suppress Inculpatory Statements and expanded oral Motion to Suppress Inculpatory Statements. Defendant cited several reasons for these assignments, including that the arrest warrant was issued without probable cause. However, he failed to argue the lack of probable cause issue in brief. Pursuant to rule 2-12.4 of the Uniform Rules - Courts of Appeal, we consider this portion of the assigned error to be abandoned by Campbell. We shall therefore only address the remaining issues raised by the defendant.

Ville Platte Police Chief L.C. Deshotel testified at trial that an arrest warrant was issued for the defendant charging him with second degree murder. The warrant appointed Gary Ortego to represent the defendant, "representation to begin immediately." Defendant was subsequently arrested at Cypress Hospital in Lafayette. The defendant was advised of his rights and booked into the Lafayette Parish Correctional Center. When the defendant was transferred from Lafayette Parish to the custody of Police Chief Deshotel and Evangeline Parish Sheriff s Deputy Jack Aucoin, he was again advised of his rights. Chief Deshotel stated that they did

not attempt to question the defendant as they were instructed by Judge Aucoin not to do so. On the way to the Evangeline Parish jail, the defendant made several spontaneous inculpatory statements.

The defendant was advised of his *Miranda* rights by Deputy Aucoin, who read from a preprinted card. At the end of the *Miranda* card, there are two questions. One asks if the defendant understood his rights and one asks if the defendant, after being informed of these rights, would like to make a statement. Chief Deshotel testified that the defendant stated that he understood his rights but he did not hear the defendant say that he wished to talk.

Deputy Aucoin testified that he read the defendant his *Miranda* rights. The defendant acknowledged that he understood his rights. When Deputy Aucoin asked the defendant if he wished to talk to them the defendant said "no." Deputy Aucoin testified that the defendant made certain inculpatory statements to him and Chief Deshotel and at no time did they question the defendant as they were instructed not to do so.

Defendant argues that his Fifth Amendment rights were violated because he did not knowingly and intelligently waive his right to remain silent. Defendant contends that both "Chief Deshotel and Deputy Aucoin were aware or should have been aware that he could not make a knowing, intelligent and voluntary waiver of his right to remain silent due to his mental disease or defect." Defendant points out that no written waiver of his right to remain silent was introduced into evidence.

Defendant's "mental disease or defect" does not prevent him from making a knowing and intelligent waiver of his rights. The issue is whether the defendant had the mental capacity and was able to understand the rights explained to him. *See Brown,* 414 So.2d 689. Both Chief Deshotel and Deputy Aucoin testified that the defendant acknowledged that he understood his rights as they were explained to him. While being read his rights, the defendant interrupted and told the law enforcement officers that he knew his rights. Deputy Aucoin finished reading the defendant his rights and

then asked the defendant if he understood his rights. The defendant acknowledged that he did. Deputy Aucoin further testified that neither he nor Chief Deshotel told the defendant anything or did anything to induce him to make these statements. Besides making several inculpatory statements, the defendant carried on a conversation with Chief Deshotel about hunting, thus leading one to believe that the defendant had his faculties and was able to understand the rights explained to him.

Dr. Jimmie Cole, a clinical psychologist who examined the defendant at Cypress Hospital, agreed with defense counsel's assertion that the defendant's 46 mental condition [was] such that it would have significantly affected the voluntariness and knowing and intelligent making of a statement on the date he was taken from the hospital." Cypress Hospital, however, allowed the defendant to sign a "formal voluntary admission" when he entered the hospital. Dr. Cole testified that a person would not be admitted unless they had the mental capacity to make such a "voluntary admission themselves."

We conclude that Campbell had sufficient mental capacity to understand the rights explained to him. He twice told the law enforcement officers that he understood his rights. No countervailing credible evidence indicates that Campbell was incapable of understanding his rights.

We next turn to the issue of whether he knowingly and intelligently waived those rights. After being read his rights, Campbell told Deputy Aucoin that he did not wish to speak, thereby invoking his right to silence. He thereafter voluntarily made inculpatory statements. We must decide if, by doing so, Campbell knowingly and intelligently waived his right to remain silent. In that regard, the supreme court in *State v. Loyd,* 425 So.2d 710, 716 (La. 1982) explained as follows:

> [The United States Supreme Court] concluded that the admissibility of statements obtained after the person in custody has decided to remain silent

depends on whether his "right to cut off questioning" was *"scrupulously honored."* Through the exercise of his option to terminate questioning, he can control the time of when questioning occurs, the subjects discussed, and the duration of questioning. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. *Michigan v. Mosley* [sic], 96 S.Ct. at 326, 46 L.Ed.2d at 321 [(1975)].

. . . .

. . . *Miranda* recognizes that the Fifth Amendment only protects against some kind of compulsion - and not the kind produced by custody alone. *In the absence of police interrogation, the coercion of arrest and detention does not rise to the level of "compulsion" within the meaning of the privilege.* Kamisar, Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?, 67 Georgetown L.J. 1, 50-53, 63-69 (1978).

[Emphasis added.]

In the case *subjudice,* Campbell's inculpatory statements were made of his own volition and not in response to interrogation by Chief Deshotel or Deputy Aucoin. Clearly, under the precepts of *Michigan v. Mosely,* these officers scrupulously honored Campbell's right to cut off questioning. He cannot now assert that his right to remain silent was violated, because no further interrogation occurred. Campbell apparently changed his mind and voluntarily decided to make the statements at issue. Nothing in *Miranda* prevents a defendant from changing his mind about giving a statement. *State v. Daniel,* 378 So.2d 1361 (La.1979); *State v. Taylor,* 490 So.2d 459 (La.App. 4 Cir.), *writ denied,* 496 So.2d 344 (La.1986).

For these reasons, defendant's claim of a Fifth Amendment violation lacks merit.

The defendant also contends that his Sixth Amendment right to counsel was violated as both Chief Deshotel and Deputy Aucoin were aware that the judge who signed the arrest warrant appointed an attorney at that time. Defendant directs this court's attention to *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232 (1977), in which the United States Supreme Court held that a defendant who, after asserting his right to counsel, made incriminating statements after further interrogation did not waive his right to counsel, and that those inculpatory statements were obtained in violation of the Sixth and Fourteenth Amendments. In *Brewer,* the Supreme Court found that prior to the interrogation, steps in the prosecution had already commenced and, therefore, the defendant's Sixth Amendment rights had already attached. This finding distinguishes Brewer from the case at hand. This case is more properly compared to *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135 (1986), in which the United States Supreme Court held that even when an attorney had been contacted by a defendant's family member without the defendant's knowledge, and the attorney was hindered in his attempt to meet with the defendant by law enforcement, the defendant's confession was still admissible assuming a valid waiver. In reaching this conclusion, the Supreme Court specifically found that the prosecution had not yet commenced and therefore, the defendant's Sixth Amendment rights had not yet attached.

Although an attorney was appointed for the defendant as part of the arrest warrant and the defendant was informed of his right to have an attorney appointed, neither Chief Deshotel nor Deputy Aucoin informed the defendant that an attorney had been appointed. Defendant contends that, once a defendant has an attorney, "the sole contact between the state and the defendant should be through the defendant's counsel." We do not find that the protection of the defendant's Sixth Amendment rights requires such a procedure. *See State v. Carter,* 94-2859 (La. 11/27/95); 664 So.2d 367.

Therefore, we do not find that the defendant's Sixth Amendment right to counsel has been violated in that it had not yet attached when the spontaneous inculpatory statements were made. Even assuming for argument that his right had attached, we still find that, based on the decision in *Carter*, his right has not been violated.

Accordingly, these assignments of error are meritless.

ASSIGNMENT OF ERROR NO. 5

By this assignment of error, the defendant contends the trial court erred in refusing to give requested jury charges numbers two, three, four and five all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict to consider. The trial court declined to give the requested charges and, instead, gave the general jury charges. Defendant objected.

La.Code Crim.P. art. 802(l) requires the court to instruct the jury as to the law applicable to the case. When properly requested to do so, the court is obligated to charge the jury as to the law applicable to any theory of defense which the jurors could reasonably infer from the evidence. *State v. Jackson*, 450 So.2d 621 (La.1984).

Defendant directs this court's attention to *State v. Williams*, 606 So.2d 1387, 1389 (La.App. 2 Cir. 1992), wherein the second circuit held:

> Under LSA-C.Cr.P. Art. 814, negligent homicide is not a responsive verdict to second degree murder. However, in cases involving various grades of murder, such as first degree murder, second degree murder, or manslaughter, when there is evidence from which the jury can infer that the defendant is guilty of negligent homicide, the trial court should charge the jury with the defendant's requested special charges on the law of negligent

> homicide. *State v. Vergo*, 594 So.2d 1360 (La.App. 2d Cir. 1992); *State v. Gray*, 430 So.2d 1251 (La.App. 1st Cir. 1983).

In Williams, evidence was presented that the victim and the defendant "tussled" just prior to the gunshot. Thus, the second circuit concluded that the jury could have found the gun discharged accidentally. Accordingly, it was reversible error for the trial court not to instruct the jury on the law of negligent homicide.

If a negligent homicide instruction is indicated by the evidence in the case, the omission of the instruction may be harmless error. Id. The court's failure to instruct on negligent homicide is prejudicial to the defendant only if the jury has insufficient information to understand that if he was guilty of only negligent homicide, it should find him not guilty of the charged offense. Id.

The only evidence presented supporting the negligent homicide jury charge is Campbell's own self-serving testimony that Mr. Sharp allegedly tried to run him over with a van. We conclude that this testimony alone is not sufficient to provide the jurors with a reasonable basis from which to infer from the evidence that negligent homicide applies. Therefore, the trial court did not err in declining to give the requested jury charge on negligent homicide. Because we find no error, we necessarily do not reach the harmless error analysis.

ASSIGNMENT OF ERROR NO. 6

By this assignment of error, defendant contends the trial court erred when it refused to give defense's requested jury charge number seven, which he alleges was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent.

In charging the jury on the law applicable to the present case, the trial judge stated:

The following are the essential facts required to be proved beyond any reasonable doubt in order to justify a verdict of guilty of Second Degree Murder.

1. That the defendant, Terry D. Campbell, killed James L. Sharp in Evangeline Parish, Louisiana;

2. That the defendant, Terry D. Campbell, acted with the specific intent to kill or to inflict great bodily harm.

Intent implies premeditation. Criminal intent exists when the act from which the crime results was done willfully. It is a mental attitude which is made known by acts. It is not susceptible of proof, but it must be implied from the proven acts of a reasonable person.

When the word intent is qualified by prefixing to it the word specific, it means that the intent was directed towards the accomplishment of a particular or definite act. Again, intent implies premeditation, and specific intent implies premeditation with reference to the commission or [sic] a particular or definite act.

In criminal law premeditation means a design or a preconceived plan to commit a crime. It denotes the will and deliberate and continued persistence to commit a crime.

With reference to the crime of murder it is immaterial whether the specific intent or premeditation existed for a brief or great length of time before the killing. It is sufficient that it existed only a moment prior to the commission of

the act which resulted in the killing. As to murder, the law indicates no definite time within which a specific intent to kill must be formed so as to make the killing murder. The specific intent may have existed a moment antecedent to the act itself which caused the death, or a day or another period of time.

Specific intent or premeditation may be implied from certain acts; for example, when it is established that an accused laid in wait for his or her alleged victim; when an accused made previous threats against the deceased; when there existed between the defendant and the deceased former grudges; when an accused arms himself or herself beforehand, or from any other facts observable by the senses, which show a previously planned scheme to commit a crime.

Specific intent or premeditation, may also be implied when there are not external signs of it beyond the mere fact of the killing. For instance, when there was no lawful reason for it; and when the killing is without provocation, or upon so slight provocation as to not justify it.

The defendant argues the court's jury instructions do not indicate that "criminal intent must exist at the same time as the acts of the defendant."

We disagree with the defendant's assessment. The trial judge adequately stated that "[c]riminal intent exists when the act from which the crime results was done willfully .... When the word intent is qualified by prefixing to it the word specific, it means that the intent was directed towards the accomplishment of a particular or definite act .... It is sufficient that it existed only a moment prior to the commission of the act which resulted in the killing." Taken as a whole, the trial court's instructions were sufficient. "When the

instruction given is not erroneous, in view of the context of the overall charge, no error occurs." *State v. Douget,* 507 So.2d 283, 289 (La.App. 3 Cir.), *writ denied,* 513 So.2d 288 (La.1987). Defendant's requested intent instruction was incorporated in the trial court's jury charge when it related to the jury that it must find the defendant "acted with the specific intent to kill or to inflict great bodily harm" in order to justify a verdict of guilty of second degree murder.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 7

By this assignment of error, the defendant contends the trial court erred when it overruled his objections to the proffered general jury charges. Specifically, he argues that the court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in La.R.S. 14:30 and La.R.S. 14:30.1 but did not specify or define the enumerated or non-enumerated felonies.

Defendant argues that because an incomplete definition of manslaughter was given, the jury could not have adequately considered that verdict. Thus, defendant claims the jury was left only with the choice of finding him guilty of the greater charge of second degree murder.

In State v. Henry, 449 So.2d 486, 488-89 (La.1984), the Supreme Court of Louisiana stated:

> [A]lthough the court must charge the jury of the law applicable to lesser included offenses. . . the charges must be pertinent; there must be evidence which would support a conviction of the lesser offenses. A trial judge is required "to charge the jury as to the law applicable to the case, under which he is required to cover every phase of the case *supported by the evidence,* whether or not

> accepted by him as true."

[Citations omitted; footnote omitted.]

In the present case, the defendant alleges he did not have the specific intent to commit the crime as he was legally insane at the time of the offense. In *State v. Hill,* 93-405 (La.App. 5 Cir. 3/29/94), 636 So.2d 999; *writ denied,* 94-3144 (La. 9/l/95), 658 So.2d 1259, the court held that the trial court did not err in failing to instruct the jury on the second section of the manslaughter statute, La.R.S. 14:31(2). The court reasoned that the trial judge was of the opinion that the specific intent was what Hill's defense was based on; therefore, the second paragraph of La.R.S. 14:31 was not relevant. Accordingly, the court held that the defendant was not deprived of any substantial right.

Unlike Hill, the defendant in the present case objected to the jury charge as given. However, as in Hill, Campbell's defense was based on a lack of intent, albeit due to his alleged insanity. Therefore, the second paragraph of La.R.S. 14:31 was likewise not relevant. We find that Campbell was therefore not deprived of any substantial right.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 8

By this assignment of error, defendant asserts the trial court erred in failing to sustain his objections to the proffered general jury charges. Defendant contends for the reasons argued in assignments of error numbers five, six and seven the objections should have been sustained. This assignment is repetitive and the merits thereof have been addressed.

ASSIGNMENTS OF ERROR NOS. 9 and 10

These final assignments of error are interrelated. As such, we shall address them together.

By these assignments of error, the defendant contends the trial court erred in denying defendant's Motion for New Trial and Motion for Post Verdict Judgment of Acquittal. In his motion for new trial, defendant asserted eleven reasons for the granting of a new trial. Defendant urged two reasons for the granting of a post verdict judgment of acquittal. Defendant states in brief that many of the issues in both motions were argued in assignments of error numbers one through nine or were abandoned. Accordingly, defendant only argues in brief grounds one, two and eleven of the motion for new trial, and both grounds for his post verdict judgment of acquittal. He alleges that a new trial should have been granted because the verdict is contrary to the law and evidence, he was incapable of distinguishing between right and wrong at the time of the offense and the ends of justice would be served by granting him a new trial.

Motion for New Trial

La.Code Crim.P. art. 951 provides, in pertinent part:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> (1) The verdict is contrary to the law and the evidence;
>
> (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;
>
> (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

When ruling on a Motion for New Trial, the trial court must apply the "thirteenth juror" standard and review the weight of the evidence. On review, the appellate court determines if the trial judge abused his discretion. If the motion is granted, the state has one year within which to retry the case unless a longer period is available under the statutory period for the particular offense. La.Code Crim.P. arts. 582 and 578.

In State v. Washington, 614 So.2d 242, 244 (La.App. 3 Cir.), *writ denied,* 619 So.2d 5 75 (La. 1993), this court stated:

> *In State v. Landry,* 524 So.2d 1261 (La.App. 3 Cir. 1988), writ granted in part, writ denied in part, 531 So.2d 254 (La.1988), appeal after remand, 546 So.2d 1231 (La.1989) [sic], this court held that a trial judge, in reviewing the merits of a motion for a new trial must review the weight of the evidence, and make a factual determination as a thirteenth juror. This court further stated that, except for an error of law, an appellate court may not review the granting or denial of a new trial under La. C.Cr.P. art. 858 citing *State v. Robinson,* 490 So.2d 501 (La.App. 4 Cir. 1986), writ denied, 495 So.2d 303 (La. 1986). In so holding, this court reasoned that the trial judge's statement indicating that he agreed with the jury's interpretation of the evidence showed compliance with the "thirteenth juror" standard of reweighing the evidence, as outlined in *Tibbs v. Florida,* 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). As a result this court found there was no error of law.

In the instant case, however, the trial judge

did not specifically mention what standard he used in determining the merits of the defendant's motion for new trial. Thus, as the trial judge did not indicate otherwise, we will assume for the purposes of this review that the trial judge properly applied the "thirteenth juror" standard in making his determination on the merits of the motion for new trial.

This court implied in *Landry* that, except for an error of law, an appellate court may not review the granting or denial of a new trial citing La. C.Cr.P. art. 858 and *Robinson*. However, *Robinson* clearly states a denial of a motion for a new trial, urged on the ground that the verdict is contrary to the law and evidence, is reviewable only for abuse of discretion. *Robinson* at 505.

Additionally, the denial of a motion for new trial based on La.Code Crim.P. art. 851(5), in the interest of justice, is not subject to review on appeal. *State v. Prudhomme,* 532 So.2d 234 (La.App. 3 Cir. 1988), *writ denied,* 541 So.2d 871 (La. 1989). Therefore, we shall not address ground number eleven of Campbell's motion for new trial, which was based upon serving the ends of justice.

As in *Washington,* 614 So.2d 242, the trial judge did not specifically mention on the record that he applied the "thirteenth juror" standard in evaluating Campbell's motion. On ground number one, based on La.Code Crim.P. art. 851(1), the trial judge stated that "the court is ruling that the verdict is not contrary to the law and evidence within the intendment of the law and jurisprudence." On ground number two, which was based on the issue of insanity at the time of the offense, the trial judge stated that "the jury apparently found that the evidence did not preponderate in favor of the defense of insanity at the time of the offense and the court is not going to change that." The trial judge's failure to specifically state that, in evaluating defendant's motion, he became the "thirteenth juror," does not necessitate a finding that

he applied the wrong standard. In the absence of any evidence to the contrary, we assume for purposes of this review that the trial judge properly applied the "thirteenth juror" standard. We infer from the substance of the above-cited trial court rulings, indicating that the jury's decision was correct, that the trial judge applied the correct standard.

On ground number one, the defendant offered no real evidence to contest the credibility of witnesses to the circumstances surrounding the shooting or the law enforcement officials who heard the voluntary inculpatory statements made by the defendant after the shooting. We therefore conclude that the trial court did not abuse its discretion in denying the motion for new trial on ground number one, that the verdict was contrary to the law and evidence.

We shall next consider whether the trial court abused its discretion by denying the motion for new trial as to ground number two, defendant's sanity at the time of the offense. The defense presented the testimony of five physicians, all of whom concluded that Campbell was incapable of distinguishing right from wrong at the time of the commission of the offense. Of these doctors, only Dr. Cole can be considered as having been Campbell's treating physician, having first treated him in 1986. The state, on the other hand, presented the testimony of four expert physicians who uniformly agreed that Campbell could distinguish right from wrong at the time of the commission of the offense. Clearly, therefore, the credible evidence and testimony conflicted on this issue.

A review of the colloquy at the hearing on Campbell's motion for new trial reveals that defense counsel argued that, in view of the strong opinions expressed by defense experts, the jury erred in failing to find that Campbell proved his insanity by a preponderance of the evidence. The assistant district attorney argued that the jury correctly made a *factual* determination based on the experts' testimony and the circumstances surrounding the shooting.

The jury heard the opinions of nine experts, five for the

defense and four for the state. All, except Drs. Cole and Donald Harper, had never examined the defendant until after the incident. A defendant is presumed sane and "has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence." La.Code Crim.P. art. 652. When a defendant presents evidence in an attempt to establish his insanity at the time of the offense, the state is not required to offer any proof of his sanity nor is it required to offer evidence to rebut that presented by the defendant. Rather, the determination of whether defendant's evidence rebuts the sanity presumption is made by the trier of fact (in this case, the jury) viewing all of the evidence including expert and lay testimony, defendant's conduct, and his actions in committing the particular crime. *State v. Bell,* 543 So.2d 1013 (La.App. 3 Cir. 1989), and the cases cited therein. As stated, in considering a motion for new trial, the trial judge, as the thirteenth juror, must apply these same rules to his evaluation of the evidence.

Under the circumstances presented in this case, we conclude that the trial judge did not abuse his discretion in refusing to change the apparent jury finding that the evidence did not preponderate in favor of the insanity defense at the time of the shooting. The expert testimony was clearly in conflict. We cannot say that, in reevaluating the evidence, the trial judge erred in reaching the same conclusion as did the jury.

Motion for Post Verdict Judgment of Acquittal

La.Code Crim.P. art. 821 provides:

> A. The defendant may move for a post verdict judgment of acquittal following the verdict. A motion for a post verdict judgment of acquittal must be made and disposed of before sentence.
>
> B. A post verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the

> state, does not reasonably permit a finding of guilty.
>
> C. If the court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive offense.
>
> D. If a post verdict judgment of acquittal is granted or if a verdict is modified, the state may seek review by invoking the supervisory jurisdiction of or by appealing to the appropriate appellate court.
>
> E. If the appellate court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive offense.

In reviewing a denial of a motion for post verdict judgment of acquittal, an appellate court in Louisiana is controlled by the standards enunciated in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979) for reviewing the sufficiency of the evidence to support a conviction. In *State v. Joseph,* 619 So.2d 1229, 1233 (La.App. 3 Cir.), *writ granted on sentencing issue,* 629 So.2d 360 (La. 1993), this court stated:

> This standard, which was adopted by the legislature in enacting La. C.Cr.P. art. 821, pertaining to post verdict motions for acquittal based on insufficiency of evidence, is that the court

> must determine that the evidence, viewed in the light most favorable to the prosecution, was insufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt.

It is the role of the fact finder to weigh the respective credibility of witnesses, and therefore the appellate court should not second-guess the credibility determinations of the trier of fact beyond the sufficiency evaluations under the *Jackson* standard of review. *State ex rel. Graffignino v. King*, 436 So.2d 559 (La.1983) citing *State v. Richardson*, 425 So.2d 1228 (La.1983).

In order for the state to obtain a conviction, it must prove the elements of the crime beyond a reasonable doubt. Second degree murder, as applicable to the case *subjudice*, is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm. La.R.S. 14:30.1(A)(1).

On May 12, 1994, a jury returned a unanimous verdict of guilty as charged. At defendant's first trial, it was stipulated that the defendant shot the victim, James Sharp. No such stipulation was made at the second trial. The evidence at the second trial consisted of several inculpatory statements the defendant made in the presence of Police Chief L.C. Deshotel and Deputy Jack Aucoin while they were transporting the defendant from the Lafayette Parish Correctional Center to Evangeline Parish.

Both Chief Deshotel and Deputy Aucoin testified that the defendant was read his *Miranda* rights yet continued to make several inculpatory statements without being prompted. Both testified the defendant said:

> What would you do if someone tried to pass over you with a van.
>
> I sure made a big mistake.

> I told Dr. Cole that I wished it was me and not that man.
>
> Where is my gun? Boy that.357 is a nice shooting gun.
>
> I just jumped out of the way. He tried to run over me so I shot him. All I wanted to do was to talk to the man, but he tried to run over me. I am sorry for what I did. I only wanted to scare him.

The victim, James Sharp, was out on the evening of January 11, 1992 with Susan Campbell, the estranged wife of the defendant. Mr. Sharp dropped Mrs. Campbell off at her home, whereupon Mrs. Campbell went inside. Although the defendant was still married to Mrs. Campbell, they were separated at the time and the defendant was residing with his sister. While exiting Mrs. Campbell's driveway, Mr. Sharp was shot through the window of his van. Glass from the window was found in Mrs. Campbell's driveway. Mr. Sharp drove a short distance into the yard of a neighbor and wrecked into a gas meter. Mr. Sharp died at the scene.

Although no gun was ever produced, a box of .357 bullets was found in the defendant's truck. The victim died as a result of a single gunshot wound from a large caliber bullet.

The evidence, when viewed in a light most favorable to the prosecution, was sufficient to find the defendant guilty of the crime charged.

For the purposes of the Motion for Post Verdict Judgment of Acquittal, the trial court correctly determined that the jury did not err in determining that Campbell was sane at the time of the commission of the offense. The jury was presented with nine expert witnesses, four of whom concluded that the defendant was capable of distinguishing right from wrong at the time of the offense. The jury weighed the respective credibilities of the witnesses and the

circumstances of the offense. It returned a unanimous verdict of guilty.

The question of whether defendant has affirmatively proved his insanity and should not be held responsible for his actions is one for the jury. *State v. Marmillion,* 339 So.2d 788 (La.1976). All of the evidence, including both expert and lay testimony, and the actions of the defendant, should be considered by the jury in determining sanity. *State v. Pravata,* 522 So.2d 606 (La.App. 1 Cir.), *writ denied,* 531 So.2d 261 (La. 1988); *Bell,* 543 So.2d 1013. It is for the jury to consider both the expert and lay testimony given and to determine whether it believed that the defendant had successfully rebutted the presumption that he was sane at the time of the offense. *See State v. Parker,* 416 So.2d 545 (La.1982).

The defendant claimed that he was insane at the time of the offense. In Louisiana, both by statute and jurisprudence, an adult defendant is presumed to be sane and responsible for his actions. La.R.S. 15:432; *State v. Guidry,* 450 So.2d 50 (La.App. 3 Cir. 1984), *writ denied,* 476 So.2d 344 (La.1985). "A defendant may rebut this presumption by showing, by a preponderance of the evidence, that he was suffering from a mental disease or defect which rendered him incapable of distinguishing right from wrong with reference to the conduct in question." *State v. David,* 425 So.2d 1241, 1244 (La.1983). *See* La.Code Crim.P. art. 652.

Although it is undisputed that the defendant suffered from a mental disease or defect, the jury, having unanimously found the defendant guilty, apparently concluded that his mental disease or defect did not render him incapable of distinguishing right from wrong at the time of the offense. A rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was legally insane at the time of the offense. Given the conflicting nature of the medical testimony and the factual circumstances surrounding the offense, we conclude that the trial court did not abuse its discretion in denying defendant's motion for post verdict judgment of acquittal.

ERRORS PATENT

La.Code Crim.P. art. 920 provides the scope of review on appeal, as follows:

> The following matters and no others shall be considered on appeal:
>
> (1) An error designated in the assignment of errors; and
>
> (2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.

In accordance with this article, we review appeals for errors patent on the face of the record.

La.Code Crim.P. art. 880 provides that, when imposing sentence, the court shall give the defendant credit toward service of his sentence for time spent in actual custody prior to the imposition of sentence. The record indicates the trial court did not do so. Resentencing is not required; however, we remand this case and order the district court to amend the commitment and minute entry of the sentence to reflect that the defendant is given credit for time served. *State v. Jones,* 607 So.2d 828 (La.App. 1 Cir. 1992), *writ denied,* 612 So.2d 79 (La.1993).

DECREE

For these reasons, the defendant's conviction and sentence are affirmed. The case is remanded for the trial court to amend the sentence as instructed in this opinion.

AFFIRMED AND REMANDED.

CRIMINAL DOCKET NUMBER 45,690

13TH JUDICIAL DISTRICT COURT,

PARISH OF EVANGELINE

Dec 1 956 AM '93

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

TERRY D. CAMPBELL

FILED: S/12-1-93 : S/Tina C. Fontenot DY. CLK.

MOTION TO QUASH GRAND JURY INDICTMENT

TO THE HONORABLE, THIRTEENTH JUDICIAL DISTRICT COURT, PARISH OF EVANGELINE, STATE OF LOUISIANA:

NOW INTO COURT, through undersigned counsel comes the defendant/mover TERRY D. CAMPBELL, and for purposes of this motion respectfully represents that:

1.

Defendant is charged by grand jury indictment with the offense of second degree murder. His trial is scheduled to commence in Ville Platte, Louisiana on Monday, December 6, 1993.

2.

Defendant/mover was indicted on February 4, 1992 and his

arraignment was on March 6, 1992.

3.

On June 1, 1992 defendant filed a Motion to Change Plea of Not Guilty to Not Guilty and Not Guilty by Reason of Insanity, This motion was granted on July 10, 1992 by the Honorable Preston N. Aucoin.

4.

Defendant now moves to quash the indictment against him and request that this prosecution be dismissed for the following reasons, to wit:

5.

Defendant shows that the indictment against him is defective in that the manner of selection of the grand jury was illegal. La.C.Cr.P., art. 533(l). More specifically, defendant/mover avers that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and the Fourteenth Amendment to the United States Constitution as well as Article I, section 2, Article I, Section 15 and Article I, Section 16, of the Louisiana Constitution.

6.

It is fundamental that defendant cannot be forced to go to trial on an indictment handed down by an unconstitutionally constituted grand jury. Johnson B. Puckett, 929 F.2d 1067 (5th Cir. 1991).

WHEREFORE, defendant prays that this Motion to Quash be heard; and thereafter the Motion to Quash be granted and the prosecution hearin be dismissed; and for full, general and equitable relief.

Respectfully submitted,

BY: S/Jesse Hearin
LAW OFFICE OF J. MICHAEL SMALL

JESSE B. HEARIN
P.O. BOX 1470
ALEXANDRIA, LA. 71303
(318) 487-8963

STATE OF LOUISIANA CRIMINAL DOCKET NUMBER 45,690-F

VS 13TH JUDICIAL DISTRICT COURT

TERRY CAMPBELL EVANGELINE PARISH, LOUISIANA

MOTIONS
DECEMBER 2, 1993

PRESENT: HONORABLE PRESTON N. AUCOIN,
DISTRICT JUDGE

RICHARD W. VIDRINE, Assistant District Attorney, representing State of Louisiana;

MIKE SMALL, JESSE HEARIN, JAKE FONTENOT, representing the defendant;

TERRY CAMPBELL, Defendant, Not present.

BY THE COURT:

This is in the case of State of Louisiana versus Terry D. Campbell, Number 45,690, which is going to come before the Court on defendant's Motion to Quash the Grand Jury Indictment. The record will show that Mr. Campbell is present in court.

BY MR. SMALL, Counsel for Defendant:

No, sir, Mr. Campbell is not here.

BY THE COURT:
Okay. I just assumed it was Mr. Campbell. I hadn't even looked.

BY MR. SMALL, Counsel for Defendant:
That's my youngest son.

BY THE COURT:
Oh, is that your son?

BY MR. SMALL, Counsel for Defendant:
He's working with me. His grades weren't quite as good as they should be, Judge, and he's out for a semester. He's working in my office until he starts back to college In Lafayette.

BY THE COURT:
He goes to USL?

BY MR. SMALL, Counsel for Defendant-:
Yes, sir.

BY THE COURT:
Great. That's my school. Good Morning, Mr. LeJeune. Good Morning, Mr. Vidrine.

Let me ask you something. I don't think we have the Motion to Suppress yet. Have you filed it? Tina was asking about it.

BY MR. SMALL, Counsel for Defendant:
The motion was filed months and months ago.

BY THE COURT:
Okay. Fine. We thought it was recently filed.

BY MR. SMALL, Counsel for Defendant:
It was filed with the original motions, Your Honor.

BY THE COURT:
Then I'll just set it instanter. That's fine. I was just concerned that it wasn't in the record.

BY MR. SMALL, Counsel for Defendant:
It should be. I have a copy.

BY THE COURT:
I'll tell you what I'm going to do, I'm going to set it for 1:00 P.M. Is that satisfactory?

BY MR. SMALL, Counsel for Defendant:
Yes, Your Honor. Your Honor, I also should apprise the court at this time that on the way to the courthouse, as we speak, there is a supplemental motion to that suppression motion which has one additional ground.

BY THE COURT:
Do you have it?

BY MR. SMALL, Counsel for Defendant:
It is being sent as we speak. It will be here before 1:00 o'clock.

BY THE COURT:
All right. I simply said that the motion is set for 1:00 P.M. on December 2. All right. Let's see. Mr. Hearin, you are the mover. Let me ask you all something. Mr. Vidrine, you have examined the exhibits that are attached to the motion, haven't you?

BY MR. VIDRINE, Assistant District Attorney:
Yes, I have, Your Honor.

BY THE COURT:
Do you disagree with any of them?

BY MR. VIDRINE, Assistant District Attorney:
I have no reason to disagree with any of them, Your

Honor.

BY THE COURT:

All right. That's fine. Mr. Hearing, you may proceed at your pleasure.

BY MR. HEARIN, Counsel for Defendant:

Your Honor, I would like to start off by seeing if the State would stimulate to the attachments as far as evidentiary purposes so I would not have to call the workers in the Registrar of Voters Office.

BY THE COURT:

I think Mr. Vidrine is inclined to agree with that. Is that correct, Mr. Vidrine?

BY MR. VIDRINE, Assistant District Attorney:

That is correct, Your Honor.

BY THE COURT:

All right. I'm going to approve that stipulation, that the exhibits attached to the motion are correct.

BY MR. HEARIN, Counsel for Defendant:

Thank you, Your Honor. in light of the recent Supreme Court Decision in Dobie Gillis Williams versus John P. Whitely, the Warden, 93KD2709 is the Docket Number, which came out November 2 of this year. The Supreme Court...

BY THE COURT:

Let's put this thing in its proper perspective. Dobie Gillis Williams was a white man or a black man?

BY MR. HEARIN, Counsel for Defendant:

He was black.

BY MR. SMALL, Counsel for Defendant:

I was involved in the case post-conviction. The defendant

In Williams was black. His victim was a white woman.

BY THE COURT:

Okay. Thank you very much. You may proceed.

BY MR. HEARIN, Counsel for Defendant:

The Supreme Court stayed an execution and - in order to remand the District Court for an evidentiary hearing on the issue of discrimination in the Grand Jury Foreperson selection procedures.

BY THE COURT:

What do you understand that to mean? What would that evidentiary - I know what they said it was about. But, in essence what would be required more than what you have attached to your motion today.

BY MR. HEARIN, Counsel for Defendant:

At that hearing to carry our burden, Your Honor?

BY THE COURT:

No, in Dobie Gillis' case. What do you think that evidentiary hearing would consist of?

BY MR. HEARIN, Counsel for Defendant:

I think that evidentiary hearing would consist of - the first part of it would be the trial judge's ruling on whether the defendant carried his prima facie case.

BY THE COURT:

Okay. That would be in the record though.

BY MR. HEARIN, Counsel for Defendant:

If he determined that then the burden would shift to the state to prove that the discrimination, that the selection procedures were not discriminatory in nature...

BY THE COURT:

All right. That would be based on the percentages and everything that has reflected on these documents that you have attached to your motion?

BY MR. HEARIN, Counsel for Defendant:
The state's burden, Your Honor? The state's response could be based on the selection...

BY THE COURT:
It would have to be based on those statistics, wouldn't it?

BY MR. HEARIN, Counsel for Defendant:
They could use other evidence also, Your Honor, of the selection procedures employed by the judges when they select a grand jury foreman. In other words,...

BY THE COURT:
That is pretty well spelled out in the statute though - the grand jury selection process.

BY MR. HEARIN, Counsel for Defendant:
Right. But, the - in other words they would have to overcome the statistical analysis through - generally it would have to be other things because the numbers are constant.

BY THE COURT:
As I understand it and I say this for the record, as I understand it here in Evangeline Parish, especially between the years that you have designated in your motion, there has been no black grand jury forepersons.

BY MR. HEARIN, Counsel for Defendant:
That is true, Your Honor. I checked the last 35 grand jury forepersons and none of them were black.

BY THE COURT:
So, what more would you need at the evidentiary hearing?

BY MR. HEARIN, Counsel for Defendant:
The state would have to try and rebut the presumption that is raised by those numbers. That is what the evidentiary hearing would be...

BY THE COURT:
That satisfies me. That's a good answer. Okay.

BY MR. HEARIN, Counsel for Defendant:
Defendant has ... confessed racial discriminatory...

BY THE COURT:
That's what I meant to say. Now, let's get to that.

BY MR. HEARIN, Counsel for Defendant:
He has standing to contest racial discrimination in the jury context in selection of the jury. This is based upon Ohio versus Powers, 111 Supreme Court, 1364, 1991, U.S. Supreme Court case. In Ohio versus Powers it was preemptory challenges which were being used in a racially discriminary...

BY THE COURT:
It wasn't about grand jury forepersons.

BY MR. HEARIN, Counsel for Defendant:
No, it was not. But it showed that the excluded jurors had - the party who brought it who was not of the same race had standing to assert the rights of excluded jurors. That is what it stands for. In other words, when racial discrimination goes on in the jury selection context that is an injury to society as a whole and the actual person bringing the claim is not the importance. It is to rectify the damage to society as a whole in the appearance of discrimination in the selection procedures. This was in the regular trial jury context.

BY THE COURT:
Okay. What is the discrimination? Dobie Gillis was a

colored man. This man, Defendant Campbell is a white man. What is the discrimination?

BY MR. HEARIN, Counsel for Defendant:

The discrimination is that blacks do not get to sit as grand jury forepersons in Evangeline Parish.

BY THE COURT:

Okay. But you haven't answered my question. How does that discriminate against Campbell since he is not black.

BY MR. HEARIN, Counsel for Defendant:

Well, it discriminates against him in one manner in that if we hold today that Mr. Campbell does not have standing to assert this claim, then the grand juries in Evangeline Parish are valid to indict white people but not to indict black people. That is discrimination against Mr. Campbell.

BY THE COURT:

That is not the first time that something like that happens. I mean that is what it is all about. That is how the black persons got their rights determined by the court. I mean, certainly you had to have a different rule for them. You had to deviate from the old rule for black persons. I'm asking you why do vou have to do it for white persons.

BY MR. HEARIN, Counsel for Defendant:

For the reason I just stated in that the grand jury can't be constituted to indict only white persons.

BY THE COURT:

What you're saying - let me stop you. That you're saying lets look at this logically. You are saying that Defendant Campbell is a white man but he has been discriminated against because there has been no black grand juror forepersons. That's what you are saving. All right. You could carry that one step further. You could say that it is because the District Attorney is not black and he can't file a - in another case. Wait, I want you to answer my question.

Logically you could carry this to the D.A. Say the D.A. is not a black man so he can't file an information. Richard Vidrine is not a black man so he can't file an information against a white man. Is that what you are saying? I mean, how - where would it stop.

BY MR. HEARIN, Counsel for Defendant:

No, I'm saying that blacks in Evangeline Parish are being denied the right to sit as grand jury foremen.

BY THE COURT:

But, Mr. Campbell is not a black. That is my whole point.

BY MR. HEARIN, Counsel for Defendant:

But, Terry's rights have not been violated. Terry is asserting third party rights of those excluded.

BY THE COURT:

Now we are dealing with standing to complain. That's what we are arguing about.

BY MR. HEARIN, Counsel for Defendant:

That's correct, Your Honor. He has third party standing to assert the rights of those blacks who have been excluded in the grand jury foreman selection process...

BY THE COURT:

Let me ask you something, Mr. Hearin. Does this apply to women too? Supposing we would show that there has never been a woman foreperson in Evangeline Parish. Could men complain of that or could it be only women?

BY MR. HEARIN, Counsel for Defendant:

I believe that Ohio versus Powers dealt with race. So whether or not we extend to gender would be...

BY THE COURT:

Yes, but Ohio versus Powers is a challenge on voir dire.

BY MR. HEARIN, Counsel for Defendant:

That is true. But it stands for the proposition that society's interest in racially neutral selection procedures is society's interested the third party standing is allowed in that context because of the importance of the...

BY THE COURT:

But you know it says regardless of national origin, race, sex, economic status and so on and so forth. I mean, you know you have to admit that this is a very, very narrow thing. I mean, when you are citing in on the grand jury foreman - supposing you would have a - the eleven other members would be black. But the foremen would always have been white. It would still be tainted?

BY MR. HEARIN, Counsel for Defendant:

Well, Your Honor, one-twelfth of the selection of each grand jury is susceptible to abuse the way the system is set up right now. Due to our statistics we have raised the presumption that there has been abuse.

BY THE COURT:

Now, you see, if Mr. Campbell was a black man this would be making much more sense to me. You can appreciate that can't you?

BY MR. HEARIN, Counsel for Defendant:

Well, I think that I have case law in U.S. versus Snead, 729 F 2nd, 1333, 11th Circuit, 1984.

BY THE COURT:

Okay. But, what do you do with Hobby versus United States, 468 U.S. 339, 104 Supreme Court 3093, 1984.

BY MR. HEARIN, Counsel for Defendant:

Hobby versus United States is not applicable. it is a due process claim.

BY THE COURT:

Okay. But why isn't this a due process why isn't this due process as well as equal protection of the laws?

BY MR. HEARIN, Counsel for Defendant:

I think a petitioner has a due process claim as well as a Sixth Amendment fair cross section claim and an equal protection claim.

BY THE COURT:

Okay. But, let's talk about Hobby. Isn't that the law? I mean, in Hobby, Hobby was a white male.

BY MR. HEARIN, Counsel for Defendant:

Hobby is in the Federal Grand Jury form in context and is a due process claim. In the Federal Grand Jury context all the grand jurors are selected and then the judge picks from them and therefore the rational of Hobby was that the grand jury foreman is a ministerial position. Contrary to that and much more similar to the facts in the Rose versus Mitchell which is...

BY THE COURT:

WAIT A MINUTE. The Federal judge still names the foreperson.

BY MR. HEARIN, Counsel for Defendant:

He does, but the grand jury has already been constituted and it has been constituted in a random fashion. In Louisiana eleven grand jurors are constituted in a random fashion. One is selected solely by the judge.

BY THE COURT:

That's not right.

BY MR. HEARIN, Counsel for Defendant:

That makes the selection process much more significant in that it taints the entire venire. The 5th Circuit has stated as much

in Geice versus Fortenberry ...

BY THE COURT:
What if the state does it like the federal judge.

BY MR. HEARIN, Counsel for Defendant:
Then perhaps an argument under Hobby could be made but it would have to be extended to the equal protection context as well if it was an equal protection argument. The two things that distinguish Hobby is it is due process and that the federal grand jury foreman - you already have a grand jury. It has been selected constitutionally. We just are going to decide who the one who is going to be in charge. In Louisiana we decide who is going to be in charge before we do the random lot. So, therefore, the susceptibility of abuse which is mentioned in the case law is much more prevalent in our situation. In other words, one twelfth of the jury could conceivably be picked in a discriminatory manner. In the federal system that's not possible. They could give on juror a little bit more statute...

BY THE COURT:
Just a minute. Of course, the federal judge has twelve of them. He picks one of them. He is discriminating - he's doing it. It's within his discretion. That's how he does it.

BY MR. HEARIN, Counsel. for Defendant:
Yes, he does, but he already has the entire grand jury selected. In Louisiana this taints not only the grand jury foreman context, but it taints the grand jury itself.

BY THE COURT:
What if the state judge would do it like a federal judge?

BY MR. HEARIN, Counsel for Defendant:
He might be able to argue under Hobby although I wouldn't conceive that a Louisiana grand jury foreman is ministerially in that context either. But the argument might be made.

BY THE COURT:
I follow you.

BY MR. HEARIN, Counsel for Defendant:
I think the applicable supreme court case is Rhodes vs Mitchell which looked at a Tennessee grand jury foreman being selected. That's 443, U.S. 545, in which the foreman was selected in much the same way as we do it here in Louisiana. And, there the supreme court said that selection without deciding the selection of the grand jury foreman itself would be subject to racial discriminatory claims in the equal protection context. Also there is case law, Peters versus Kiff in the United States Supreme Court, 407 U.S. 493, in which they said that race is of no relevance in that discriminatory context.

BY THE COURT:
Mr. Hearin, is there a federal decision that says that when the defendant is a white man and if he shows that there has never been any black foreperson serve on the ground jury that it is a denial of equal protection of the law. Is there a federal decision?

BY MR. HEARIN, Counsel for Defendant:
U.S. versus Snead, 729 F 2nd, 1333, 11th Circuit 1984 stands for that proposition.

BY THE COURT:
What about Hobby? That's the Supreme Court.

BY MR. HEARIN, Counsel for Defendant:
But, it's not applicable to our facts, Your Honor. It wasn't looking at a state selected grand jury foreman. It was looking at it federally and because the difference...

BY THE COURT:
That's how you distinguish it.

BY MR. HEARIN, Counsel for Defendant:
That's how I distinguish Hobby, Your Honor.

BY THE COURT:
Okay. Very good.

BY MR. HEARIN, Counsel for Defendant:
I would also point the language of Guice versus Fortenberry, 5th Circuit, 661 F2nd 486, 1981 in which language to the effect of prejudice to the defendant himself is not - I'm paraphrasing, Your Honor, - prejudice to the defendant. Which, of course, is the traditional equal protection inquiry injury in fact and I would submit that Guice versus Fortenberry, Piers versus Kiff, U.S. versus Snead, Rhodes versus Mitchell and Ohio versus Powers stand for the proposition that a white defendant has third party standing to assert the black citizens right to be selected to a grand jury. He only has the right if we were able to prove our case to sit on eleven twelfths of the grand jury here. One spot is not available.

BY THE COURT:
Let me ask you this. If your client was charged with a lesser offense, let's say he was charged with aggravated battery, all right, do you believe that a white District Attorney or a - if you have only had white District Attorneys that they could file an information against him?

BY MR. HEARIN, Counsel for Defendant:
I do believe so, Your Honor.

BY THE COURT:
Okay. What is the difference?

BY MR. HEARIN, Counsel for Defendant:
Well, the difference is first of all the defendant has a right under state law for the offense he is charged with to be indicted by a grand jury.

BY THE COURT:
He has rights too if it is a bill of information that has been filed against him. What is the difference?

BY MR. HEARIN, Counsel for Defendant:
The District Attorney is an elected position. The grand jury foreman is a person selected by the judge who is the similar...

BY THE COURT:
In the federal system they are not elected. No, sir, the District Attorneys are not elected in the federal system.

BY MR. HEARIN, Counsel for Defendant:
They are not selected by the judge.

BY THE COURT:
They are selected by the President.

BY MR. HEARIN, Counsel for Defendant:
They are selected by the President, but the difference is that in the Louisiana context the judge selects the person who is going to be there. The judge is supposed to be epitomy of neutrality. He is
the symbol of fairness. He is the symbol of the court.

BY THE COURT:
But ... say that he is not.

BY MR. HEARIN, Counsel for Defendant:
I'm saying that that is why there is concern in this area of the law for this and especially to - it is even more compelling here than in the peremptory challenge context because there the D.A. and the defense attorney adversarials are trying to do something on behalf of their client. Here in selecting a grand jury foreperson there can be no other reason than fairness and equality for the judge to make the selection. There is no...

BY THE COURT:
You don't have any evidence before this court that the grand jury was not fair.

BY MR. HEARIN, Counsel for Defendant:

I don't submit that...

BY THE COURT:
You're not even arguing that, are you?

BY MR. HEARIN, Counsel for Defendant:
I'm not arguing that - that there was not, as far as their determinations, I haven't even done that research or given it much thought, Your Honor.

BY THE COURT:
I'm looking at this thing very close, Mr. Hearin. I want you to know that. I read all of your brief and I read everything that you filed. I'm very interested in this and I want you to know it. I think you are making a good argument.

BY MR. HEARIN, Counsel for Defendant:
I would just also emphasize some case law in which - well, actually I'd like to move on to the prima facie case, Your Honor, if you are...

BY THE COURT:
All right.

BY MR. HEARIN, Counsel for Defendant:
In order to show a prima facie case the defendant must show that a recognizable distinct group was discriminated against. He must prove the degree of underrepresentation was - by comparing the general population as we did in our affidavit.

BY THE COURT:
That has been done. In fact,....

BY MR. HEARIN, Counsel for Defendant:
One and two have been met. I think we would all agree.

BY THE COURT:
From your point of view there is more over here than there

was in Sabine Parish.

BY MR. HEARIN, Counsel for Defendant:
That's true. In Sabine Parish it was 14 to 16%.

BY THE COURT:
Figures don't lie. I understand that.

BY MR. HEARIN, Counsel for Defendant:
Here it is 23.25% eligible voters. I think the battle ground prima facie case is selection procedures susceptible to abuse. Actually I don't think there is as far as putting on a prima facie case I don't think we really have a significant...

BY THE COURT:
But that is contingent on the court finding that Campbell is standing to complain.

BY MR. HEARIN, Counsel for Defendant:
Absolutely right.

BY THE COURT:
Okay.

BY MR. HEARIN, Counsel for Defendant:
So in order to satisfy the three tests I would submit it is beyond dispute - a recognizable distinguishable group is blacks in America. I could cite Johnson versus Puckett a Fifth Circuit Court opinion, 1991. I can get you the cite on that.

BY THE COURT:
It's in your brief. You have it in your brief, don't you?

BY MR. HEARIN, Counsel for Defendant:
Yes, Your Honor.

BY THE COURT:
I read your brief.

BY MR. HEARIN, Counsel for Defendant:

So, being prone to the under representation by comparing, uh, clearly our actual disparity is 23.25%, also the fact that zero have been chosen tends to be emphatic because I mean when zero are chosen as the Fifth Circuit said nothing is emphatic as zero. That's again from Johnson versus Puckett. So, since there is 23.25% eligible and zero have been chosen that is an actual disparity and, uh, in U.S. versus Hernandez 672 F 2nd, 1380 at Page 1387, Eleventh Circuit case 1982, the court held that 14.6 actual disparity was clearly under representation. So, in other words, the difference between the eligible population and the percentage shown, which is our case is zero.

BY THE COURT:

uh-huh.

BY MR. HEARIN, Counsel for Defendant:

In the third - I think he has met - the third simply requires that the selection procedure is susceptible to abuse. At this stage of the proceedings I don't have to show that it is evil intent or that abuse has occurred, but clearly if a person wanted to abuse the procedure as it stands they could. if there were someone who wanted to appoint only Chinese people to the grand jury foreman position they could under the law.

BY THE COURT:

Let me stop you for a moment. Let's say that you are correct. Now, all of this has, so for, has come before the court on post-conviction relief. As far as I know this is the first one that has been argued before the trial. Isn't that correct? There may be some others throughout the state, but I don't know of them.

BY MR. HEARIN, Counsel for Defendant:

The law that I have-seen has come in...

BY THE COURT:

I mean Dobie Gillis was post-conviction.

BY MR. HEARIN, Counsel for Defendant:

That's true, Your Honor.

BY THE COURT:

All right. Now, what I want to ask you. Let's assume for the purposes of this question that, you are correct and I sustain you. That's going to wipe out all of those convictions that were ever this would wipe out all Evangeline Parish convictions where there was a grand jury indictment?

BY MR. HEARIN, Counsel for Defendant:

They would have to have their own hearing and they could go back to the grand jury that indicted...

BY THE COURT:

Yes, but we know the answer. Every grand jury that indicted them had a white foreman.

BY MR. HEARIN, Counsel for Defendant:

It would depend on....

BY THE COURT:

I mean it would wipe them all out - even though ten years ago, twelve years ago, twenty years ago, two years ago - you'd wipe them all out?

BY MR. HEARIN, Counsel for Defendant:

Well, each defendant would have to show his own time period. Okay? Our ...

BY THE COURT:

No, but look, each defendant would show exactly what you are showing for Campbell. They would probably find your brief and submit that. Your figures don't lie.

BY MR. HEARIN, Counsel for Defendant:

They could show, perhaps someone that had been indicted

in 1986 could show that, uh, that ...

BY THE COURT:
I think Dobie Gillis was ...

BY MR. HEARIN, Counsel for Defendant:
...the time frame is not relevant. I would submit that if we rule on that this does not win only on standing then we would still have the same problem with all the blacks who had ever been indicted.

BY THE COURT:
Because you know, let me tell you if I rule that way or if a court higher than me rules that way you know what you're doing. You know what door you are opening?

BY MR. HEARN, Counsel for Defendant:
I do know that, Your Honor.

BY THE COURT:
Proceed.

BY MR. HEARN, Counsel for Defendant:
I do submit that in each case it would be individual and no I don't know the answer...

BY THE COURT:
Yes, you say that, but as a matter of fact it wouldn't be individual. They don't have the same motion. Look it would circulate through the penitentiary. I can see it. We would have catalogs of them.

BY MR. HEARN, Counsel for Defendant:
And I do not know the retro-activity question as far as ...

BY THE COURT:
Now, you're cooking. That is what - you touched on something good there. I think the court would have to deal with

that, don't you? I don't think they could make it go back to 1900. There might be some still in jail since 1900 I don't know. I doubt it.

BY MR. HEARIN, Counsel for Defendant:
Perhaps. My point being that the remedy in this situation and the fact that...

BY THE COURT:

The remedy you want is to quash the indictment. That's what you want.

BY MR. HEARIN, Counsel for Defendant:
Before trial.

BY THE COURT:
That's why we are here today and the trial is Monday.

BY MR. HEARIN, Counsel for Defendant:
That's true, Your Honor, but I submit that if it is relevant, if it is allowed to do it after the conviction it's silly not to deal with it before the trial.

BY THE COURT:
According to the Louisiana Law I think you are supposed to do it before the trial. Motions to Quash, you know, to raise issues like that it is proper. Your motion is properly brought. I'm not saying that it is not, you understand, and I don't think that the state is going to object that you can file a Motion to Quash prior to the commencement of the trial. It is just that this raises all kinds of issues, Mr. Hearin.

BY MR. HEARIN, Counsel for Defendant:
I recognize the practical implications.

BY THE COURT:
You understand that.

BY MR. HEARIN, Counsel for Defendant:
Simply stated that the law as it stands has a remedy for this situation. That remedy is before trial to quash the indictment.

BY THE COURT:
How would we do that? Let's say that you are right and not start. Okay. Then I would have to say, Evangeline Parish has - what - 23.8G% or something like that.

BY MR. HEARIN, Counsel for Defendant:
23.25% blacks.

BY THE COURT:
So -then I would have to say, all right, we have two grand jurys a year and let's figure out the percentage. That would be roughly one-fourth. So it would be one-fourth black and three fourths white. That would mean that every fourth grand jury would have to have one black foreperson. Right?

BY MR. HEARIN, Counsel for Defendant:
That's not correct Your Honor.

BY THE COURT:
Okay. Tell me why it is not.

BY MR. HEARIN, Counsel-for Defendant:

The selection procedure would have to be racially neutral which is what the state...

BY THE COURT:
Yes, but that's not what you're saving. Let me tell you something. That's not what you are saying. You are saying that because Evangeline Parish is nearly 24% black that we would have to figure out a way to have a black foreperson approximately 24% of the time. That's what you are saying.

BY MR. HEARIN, counsel for Defendant:

No, I'm not.

BY THE COURT:
Then what are you saying?

BY MR. HEARIN, Counsel for Defendant:
I'm saying that that establishes a prima facie case...

BY THE COURT:
All right. Look, let's get practical over here. How do you want the court to select a foreman from now on If you win your argument.

BY MR. HEARIN, Counsel for Defendant:
I would leave that up to the court, Your Honor.

BY THE COURT:
Well, of course you would. That's a good way to dump it off. The court would have to - you know what you are saying. You are saying regardless, regardless of anything, you do admit that you are not attacking this grand jury as not being fair. RIGHT? You said you weren't. But, you are telling me I have to figure out a way because of the percentages, that I have to figure out a way of appointing black people, ladies or men, to the grand jury. So, I want to know how will I do it? Every other time, one out of three, one out of four, two to-one. All the time.

BY MR. HEARIN, Counsel for Defendant:
No, I don't think it would be done on a statistical basis like that.

BY THE COURT:
If that is so then why did you figure out all those percentages and why did the Supreme Court in Sabine Parish figure out all the percentages?

BY MR. HEARIN, Counsel for Defendant:
Because once it is shown the Supreme Court wants a

racially neutral selection procedure. Not necessarily numerical to be designed. It points out a possible problem in the system and...

BY THE COURT:

Let me make my point clearer. Sabine Parish is between 14 and 16. Evangeline has just about 24. How many black - in a ten year period how many black foreman would you have to have in Sabine Parish and how many black would you have to have in Evangeline Parish. Evangeline Parish is about 10% more.

BY MR. HEARIN, Counsel for Defendant:

Well, would probably have to have an actual disparity between the population of something less than 14.6%.

BY THE COURT:

I'm just pointing out to you the difficulty that the court would have - that the court may have. You understand? Okay. Proceed. You are making a very good argument and you must not believe that I'm picking at you. I think you wrote a real good brief and I think your argument is very, very persuasive and I think you are handling it very well.

BY MR. HEARIN, Counsel for Defendant:

I'm not concerned about you picking at me, Your Honor.

BY THE COURT:

That's good.

BY MR. HEARIN:, Counsel for Defendant:

I think simply the way the law is set up, and I'll conclude on this note, is that the statistical analysis makes the court look at it in an evidentiary hearing. If the state cannot overcome that then it is time to look and see why those numbers came up.

BY THE COURT:

That's - okay - we're right back where we started from. You want me to hold an evidentiary hearing?

BY MR. HEARN, Counsel for Defendant:

I would submit that we have carried our burden to show a prima facie case.

BY THE COURT:

I've asked you this question and I - there's one that you haven't satisfactorily answered. What kind of evidentiary hearing would we have. The District Attorney has already agreed that all of your figures, and your statistics, and your things that you appended to your motion are correct. So, what would you want? You would want him to bring the other judges, that we hear all these judges that are still alive and ask them how them pick juries. I tell you what they would say. They would say that they selected the foreman. That's what they would tell you.

BY MR. HEARN, Counsel for Defendant:

That's true. But, the D.A. would have the opportunity to show that that despite the numbers they came up by chance. It is conceivable possible.

BY THE COURT:

But not when you say they are all white. I mean, I don't think there is anybody in this courtroom that disputes the fact that there has never been a black grand jury foreperson in this parish. So, what kind of evidence would Mr. Vidrine put on?

BY MR. HEARN, Counsel for Defendant:

He would have to put on evidence of objectively neutral procedures that have been practiced during that time span and that they were practiced and yet we still had 35 in a row. That would be his burden and it is a big burden I admit.

BY THE COURT:

Not a big one an impossible one. Okay. You're doing good. You want Richard to argue now and then you want to refute what he is going to say?

BY MR. HEARN; Counsel for Defendant:

That would be fine. I would close by saying I do believe that we have carried the burden on the prima facie case at this time.

BY THE COURT:
All right. This is what I'm going to do. I'm going to let Mr. Vidrine argue and then I'm going to let you come back and refute what he says. Mr. Vidrine. Look, I don't want to tell you how to argue and but I'm interested primarily in this standing to claim. I think it is two things. I think it is denial of equal protection of laws and due process. That is how I see it. And, I would like to know whether or not since Campbell is white he has a standing to ...

BY MR. VIDRINE, Assistant District Attorney:
Our position, Your Honor, is very simple. In this particular case...

BY THE COURT:
Yes, in this particular case. Well have to take one at a time.

BY MR. VIDRINE, Assistant District Attorney:
Yes, sir. In this particular case and we're not conceding about any other case or any other scenario or any other...

BY THE COURT:
No, no, this is the case sub judice. Okay.

BY MR. VIDRINE, Assistant District Attorney:
We have a white defendant, we have a white grand jury foreman.

BY THE COURT:
And you have a white victim.

BY MR. VIDRINE, Assistant District Attorney:
And we have a white victim. We suggest to the court that he, Terry Campbell, does not have standing in this court. The defendant's group in order for him to seek relief he has to show

that the defendant's group is one that is a recognizable distinct class singled out for different treatment. He can't show that. He has not shown that.

BY THE COURT:
Because he is white.

BY MR. VIDRINE, Assistant District Attorney:
Because he is white he has no standing. If he were not white, if he were black, perhaps we would have a different situation.

BY THE COURT:
Or perhaps Chinese, or Asian or Hispanic or something like that. Okay.

BY MR. VIDRINE, Assistant District Attorney:
But that is our situation. He does not have standing because he is white and he just doesn't have standing.

BY THE COURT:
All right. Now, listen. Let me ask you something. What if I find standing what do you say about that?

BY MR. VIDRINE, Assistant District Attorney:
Well, Your Honor, if you find standing and if vou find that there is a substantial degree of under representation when comparing the proportion of the group and the total population to the proportion...

BY THE COURT:
This is what I know, Mr. Vidrine, and you know it and we all know it. We know that we have nearly 24% of our people in this parish who are black people.

BY MR. VIDRINE, Assistant District Attorney:
Correct.

BY THE COURT:

We know that. We also know that there has never been a black foreperson on the grand jury. We know that. We have had black foremen on petit juries and we've had them in civil juries, but you have not had them on grand juries. We also know that Campbell is white. We know that the foreperson who sat in on the grand jury was white. And, we know that the victim, Mr. Sharp, was white. Now, those are things that we know and we have to accept. We know the percentages and we know everything. Okay. I think that the standing is the big issue.

BY MR. VIDRINE, Assistant District Attorney:

So do I.

BY THE COURT:

Okay. if you have finished. Now, Mr. Hearn, I'm a firm believer that each lawyer is the architect of his own case. I only suggest, you understand, I don't tell you what to do. But, I think if you want to refute this you should refute the standing argument first.

BY MR. HEARN, Counsel for Defendant:

Yes, Your Honor. According to that rational we could pick all white grand juries and white people would have no standing to assert that, you know, that the selection process was wrong. I mean, if only a white and besides we're missing the boat on that the white defendant is asserting the right of the excluded blacks. That's the rational of the equal protection claims.

BY THE COURT:

But look at how this thing is impossible though. Supposing Mr. Campbell was black. Could Mr. Campbell argue that he wants a white foreman?

BY MR. HEARN, Counsel for Defendant:

Certainly if there was a discriminatory record over the years that the selection process is tainted. I would also submit that if the selection process is substantially defective for any reason,

race or otherwise, any action that the grand jury takes against black, white or any male or females, true bill or no true bill is per se substantially defective on it's face.

BY THE COURT:

Okay. Now you see you are saying male and female. All right. Supposing that Mr. Campbell was a woman, and Mr. Campbell would say, all right, I went check all the records. Mr. Hearin went and checked all the records. There has never been a female grand jury forelady, foreperson, in Evangeline Parish. Would we be arguing the same think today?

BY MR. HEARN, Counsel for Defendant:

There could be an argument made.

BY THE COURT:

Yes, because the thing says regardless of sex, nationality...

BY MR. HEARN, Counsel for Defendant:

Although that is not true there have been female grand jury foremen.

BY THE COURT:

It was a hypothet really, you know. I didn't mean to mislead you. I meant it as a hypothet. We could take the Parish of Utopia and say look there has never been a female foreperson. So, I'm a female defendant and I want the indictment quashed because there has never been a female on the grand jury as a foreman.

BY MR. HEARN, Counsel for Defendant:

Once again, Your Honor, I don't think it would necessarily matter other than clearly the Supreme Court has extended him the racial discrimination context of third party standing. Now, whether that would go to gender or not maybe an issue at that hearing which would be difference from ours. I submit that there is clear law out in the racial discriminatory context because of the history of it that gives third party standing to those who are excluded and the defendant, regardless of his race, can raise it for the good of

society as a whole, so that our grand juries and our trial juries are not selected in a discriminatory fashion so it doesn't diminish the public's faith in our judicial system is the basic rational in Rhodes versus Mitchell and the cases I've cited in my memorandum.

BY THE COURT:
Okay. I guess we've just about beat a dog to death over here. But - go ahead.

BY MR. HEARN, Counsel for Defendant:
Let me add that I have not seen in the standing analysis that I have read any reference to the practical difficulties as to the remedy as to why the person does or does not have standing.

BY THE COURT:
Okay. And before I let you sit down. You think this is only an equal protection problem or it is also a due process problem.

BY MR. HEARN, Counsel for Defendant:
I think the defendant has equal protection claims, due process claims and fair cross section claims.

BY THE COURT:
I agree with you. That's the problem. I agree with you. Okay.

BY MR. HEARN, Counsel for Defendant:
Can I add one thing, Your Honor.

BY THE COURT:
Certainly. In this court time is of no moment.

BY MR. HEARN, Counsel for Defendant:
As to the fair cross section I would simply, which is in my memorandum, Rule 25 of the Supreme Court which shows the court's allegiance to the fair cross section requirement.

BY THE COURT:

Okay. Mr. Vidrine do you have anything?

BY MR. VIDRINE, Assistant District Attorney:
The only thing I would add, Your Honor, in the case of U. S. Supreme Court case of Castaneda versus Partida, 430 U.S. 482, where it sets out the three prong test. In that case it shows that once the defendant has shown substantial under representation of his group.

BY THE COURT:
Yes, but that's after you find standing.

BY MR. VIDRINE, Assistant District Attorney:
To find standing.

BY THE COURT:
Yes, so they dovetail together. Okay. Gentlemen, Im going to rule. Now, in the event that this is transcribed it is going to constitute this court's written reasons for judgment on this Motion to Quash the Grand Jury Indictment. Of paramount importance to the court here is whether or not the Defendant Campbell has standing to raise the issue of equal protection and/or due process in the grand jury foreperson selection contest in the 13th Judicial District, Evangeline Parish, Louisiana. Should this court rule that he lacks this standing the court will need go no further and the Defendant Campbell's Motion to Quash the Grand Jury indictment will be denied. In this case it is undisputed that both the Defendant Campbell and the dead victim Sharp are white men. It is also undisputed that the foreperson who sat on this grand jury, was a white man. Therefore, the real burning issue before this court is how does the exclusion of negroes from the position of grand jury foreperson violate Defendant Campbell, a white man's constitutional equal protection and/or due process rights. I remind you, all of you, that I am only dealing with the case sub judice, the case before me today. Gentlemen, how can the exclusion of negroes from the position of grand jury foreperson, keeping in mind that the grand jury is an accusatory body. How can that impair the confidence of Defendant Campbell, a white man, in the

administration of criminal justice. How can Defendant Campbell, who approached the court for selecting a foreperson of his own race to a grand jury that has accused him of killing white man another member of his own race. How can such a procedure cast a doubt upon the integrity of the judicial process. How, can Defendant Campbell, a white man, be prejudiced by the court appointing a foreperson who is also a white man. Is Defendant Campbell prejudiced because the grand jury foreperson was a white man? How can such a procedure place the fairness of a criminal proceeding in doubt. How can Defendant Campbell, a white man, complain that the foreperson, another white man, who sat on the grand jury that indicted him was tainted. And, as far as that goes all the other white forepersons who sat on the Evangeline Parish grand juries in the past at least from 1;76 to present, were tainted. How can Defendant Campbell argue that he was racially discriminated against. This Court answers all the above questions in the negative. There is no claim here that the grand jury that indicted Defendant Campbell was one that was selected at random and from a fair cross section of Evangeline Parish, the 13th Judicial District. There is no claim that that wasn't how it was. There is no claim that the members of the grand jury who indicted him were excluded on the count of race, color, religion, sex, national origin or economic status. And, there is on the books, the United States Supreme Court decision of Hobby versus United States, 468 US 339, 7045 Supreme Court 3993 (19984), which holds that the discrimination in the selection of a federal grand jury foreperson does not constitute a violation of due process. Hobby was a white man seeking relief under the due process clause of the Fifth Amendment. Just as Defendant Campbell is doing here under the equal protection clause, but by admission of counsel also under the due process clause.

The court holds that in the case subjudice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant Campbell. Again I'm restricting all of my comments to this one particular case that we're here on this morning.

This court rules that the Defendant Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant Campbell has no standing to raise that issue. That being the case the court need not consider the other issues. The Motion to Quash the Indictment is denied. Mr. Vidrine, you will prepare a judgment to that effect and submit it to me for signature hopefully while Mr. Hearin and Mr. Small are still here during the day.

BY MR. VIDRINE, Assistant District Attorney:
Yes, sir.

BY THE COURT:
Gentlemen, that is my ruling. Thank you very much.

BY MR. HEARIN:, Counsel for Defendant:
Your Honor, I would like to respectfully object to your ruling and...

BY THE COURT:
Certainly.

BY MR. HEARIN:, Counsel for Defendant:
... and seek a delay for seeking writs.

BY THE COURT:
You have a perfect right to seek writs, but there is going to be no delay and there is going to be no stay order granted. If you want to take writs tell her right now so she can go type it up.

BY MR. HEARIN:, Counsel for Defendants:
We'd like to confer on whether we actually want to take a writ.

BY THE COURT:
You understand that the bird of time is on the wing over

here.

BY MR. HEARIN:, Counsel for Defendant:
I understand.

BY THE COURT:
You'll have to tell her if you want just my ruling or if you want all of the colloquy. If you want all of the colloquy it is going to be a much bigger job. If you want only my ruling and then the colloquy is going to be your argument in the brief to the Court of Appeals and/or the Supreme Court - I know you file them with both courts. But, whatever you decide. We're at your disposal and - the only thing I'm asking you is - her name is Kellie - let Kellie know as soon as you can.

BY MR. HEARIN, Counsel for Defendant:
Yes, sir, Your Honor. I just wanted to protect our right to...

STATE OF LOUISIANA **CRIMINAL DOCKET NO. 45,690-F**

Dec 6 1203 pm '93

VERSUS **13TH JUDICIAL DISTRICT COURT**

TERRY CAMPBELL **EVANGELINE PARISH, LOUISIANA**

JUDGMENT

This case came for hearing on the "MOTION TO QUASH GRAND JURY INDICTMENT" filed by defendant, **TERRY CAMPBELL,** which hearing was held on December 2, 1993.

APPEARANCES: Defendant, **TERRY CAMPBELL,** and his attorney's, J. Michael Small, Jesse Hearin and Raymond LeJeune, appearing for J. Jake Fontenot;
and
The State of Louisiana, represented by Richard W. Vidrine, Assistant District Attorney;

For the reasons orally assigned in open court, after the hearing of this case:

IT IS ORDERED, ADJUDGED AND DECREED that the "MOTION TO QUASH GRAND JURY INDICTMENT" filed by defendant, **TERRY CAMPBELL,** be and the same is hereby denied.

JUDGMENT rendered on December 2, 1993.

JUDGMENT read and signed on this 6th day of December, 1993, at Ville Platte, Evangeline Parish, Louisiana.

S/Preston N. Aucoin
PRESTON N. AUCOIN
DISTRICT JUDGE

S/12-6-93
This is to certify that a copy
of the above and foregoing
S/Judgment
Has been mailed to:
S/Richard Vidrine
S/Mike Small
S/Jake Fontenot
S/TCA Deputy Clerk of Court

FILED S/5 20- 19 S/94
S/A.F.D. Dy. Clerk

CRIMINAL DOCKET NO. 45,690-F

STATE OF LOUISIANA	: 13TH JUDICIAL DISTRICT COURT
VERSUS	: PARISH OF EVANGELINE
TERRY D. CAMPBELL	: STATE OF LOUISIANA

Filed:_____ : _____ Dy Clk

MOTION FOR NEW TRIAL

NOW INTO COURT comes the defendant, TERRY D. CAMPBELL, through undersigned counsel, and he does, with respect, move a new trial pursuant to Louisiana Code of Criminal Procedure, Article 851 (1), (2) and (5). He affirmatively alleges that injustices have been done to him for which he is entitled to a new trial.

1.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (1), for the reason that the verdict is contrary to the law and the evidence. More particularly, the evidence does not establish beyond a reasonable doubt that the defendant, TERRY D. CAMPBELL, intended to kill James L. Sharp. Moreover, the evidence does not establish beyond a reasonable doubt that the defendant, TERRY D. CAMPBELL, intended to inflict great bodily harm upon James L. Sharp.

2.

A new trial should be granted to defendant, TERRY D.

CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (1), for the reason that clearly the preponderance of the evidence establishes the defense of insanity at the time of the offense - that is. that the circumstances indicate that because of a mental disease or defect the defendant, TERRY D. CAMPBELL, was incapable of distinguishing between right and wrong with reference to the conduct in question.

3.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (2), for the reason that the Court's ruling on a written motion made during the proceedings shows prejudicial error in that the Court overruled the defendant's Motion to Quash Grand Jury Indictment. More particularly, defendant, TERRY D. CAMPBELL, was charged by a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected in that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 2, Article 1, Section 15, and Article 1, Section 16, of the Louisiana Constitution. It is fundamental that a defendant cannot be forced to trial on an indictment handed down by an unconstitutionally constituted grand jury. See *Johnson v. Puckett,* 929 F.2d 106 (5th Cir. 1991).

4.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (2), for the reason that the Court's ruling on the issue of the defendant's present capacity to proceed is prejudicial error and resulted in an injustice being done to the defendant for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him or to assist in his defense remained with him throughout the proceedings and exist to this date. In this

connection, the defense urges not only the evidence presented to the Court at the sanity hearings conducted on January 8, 1993 and June 11, 1993, but also the evidence adduced during the course of the trial conducted on May 9, 10, 11, and 12, 1994. The defendant's condition was such that he could not regain his capacity to proceed.

5.

A new trial should be granted to defendant, TERRY D. CAMPBELL, for the reason that Court's ruling on November 12, 1993, which overruled defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial is prejudicial error which resulted in an injustice being done to the defendant. In additional, the Court's subsequent ruling on November 23, 1993, which overruled defendant's oral Motion for Limiting Expert Witnesses was prejudicial error which resulted in an injustice being done to the defendant, TERRY D. CAMPBELL.

6.

A new trial should be granted to defendant, TERRY D. CAMPBELL, for the reason that Court's ruling on the written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress is prejudicial error which resulted in an injustice being done to the defendant. In addition to the prejudicial error which the defendant suffered as a result of the ruling which the Court made on December 2, 1993, on the written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress, the defendant, TERRY D. CAMPBELL, had an injustice done to him as a result of the rulings the Court made during the course of the trial on the oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause). In this connection, the defense urges not only the testimony and exhibits presented to the Court on

December 2, 1993, at the hearing on the Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress, but also the testimony of L. C. Deshotel and Jack Aucoin given on January 11, 1994, during the first trial, as well as the testimony of L. C. Deshotel and Jack Aucoin given on May 10, 1994, during the second trial, and the testimony of Dr. Donald C. Harper, Dr. Jimmy Cole, Dr. William Cloyd, Dr. Lyle LeCorgne, Dr. Paul Ware, Dr. Richard L. Gibson, Dr. Jay C. Pennington, Dr. Phillip Landry and Dr. Charles Fontenot given on May 11 and 12, 1994. Among other things, the cumulative effect of this testimony shows that the defendant, TERRY D. CAMPBELL, could not have understood, remembered, and waived his constitutional rights at the time the statements were alleged to have been given.

7.

A new trial should be granted for the reason that the Court refused to give defense requested jury charges number 2, 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

8.

A new trial should be granted for the reason that Court refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

9.

A new trial should be granted for the reason that Court overruled the defendant's written objections to the proper general jury charges which said objections were tendered to the Court timely in a document entitled "Defense Objections to Proffered General Jury Charges." More specifically, the Court's charge defining manslaughter was incomplete and inaccurate and referred

to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the Court's general charge did not specify the enumerated or non-enumerated felonies nor did the Court's general charge define the enumerated or non-enumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

10.

A new trial should be granted for the reason that Court declined to sustain defense objections to the proffered general jury charges and declined to remove from the general charges the following language, to-wit:

A) At page 6 of the proffered general jury charges:

> "Specific intent or premeditation may be implied from certain acts; for example, when it is established that an accused laid in wait for his (or her) alleged victim; when an accused made previous threats against the deceased; when there existed between the defendant and the deceased former grudges; when a accused arms himself (or herself) beforehand, or from any other facts observable by the senses, which show a previously planned scheme to commit a crime.
>
> Specific intent, or premeditation, may also be implied when there are no external signs of it beyond the mere fact of the killing; for instance, when there was no lawful reason for it; and when the killing is without provocation, or upon so slight provocation as to not justify it."

B) At page 7 of the proffered general jury charges:

> " . . . either Article 30 (first degree murder), or..."

C) At page 7 of the proffered general jury charges:

"(2) A homicide committed, without any intent to cause death or great bodily harm:

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 and 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

It will be noted that the article just read to you states that 'Manslaughter is (1) a homicide which would be murder under Subdivision (1) of Article 30.1 (Second Degree Murder). but the offense is committed in sudden passion', etc."

D) At page 8 of the proffered general jury charges:

"Next, the manslaughter article makes it a crime to kill a person unlawfully, even though the accused did not intend to cause death or great bodily harm, if the accused as the time he (or she) delivered the fatal blow, was engaged in the perpetration or attempted perpetration of any intentional misdemeanor directly affecting the person."

E) At page 10 of the proffered general jury charges:

"if you find that the defendant established by a preponderance of the evidence the defense of insanity at the time of the offense, then your

verdict should be 'We, the Jury, find the defendant not guilty by Reason of Insanity'."

11.

A new trial should be granted under the provisions of Louisiana Code of Criminal Procedure, Article 851 (5), which provides:

"... The court, on motion of the defendant, shall grant a new trial whenever:

. . .

(5) The court is of the opinion that the ends of justice would be served by the granting a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

It is obvious for the reasons urged above, among others, that the ends of justice would be served by granting the defendant, TERRY D. CAMPBELL, a new trial. The various rulings indicated above show that injustices have been done to the defendant which constitute prejudicial error and the jury which returned the verdict did not properly apply the law with respect to present insanity and failed to implement R.S. 14:14, and Louisiana Code of Criminal Procedure, Article 652, which, respectively, provides:

"If the circumstances indicate that because of a mental disease or defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." R.S. 14:14.

"The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence." C.Cr.P. Art. 652.

WHEREFORE, IT IS PRAYED that after a contradictory hearing with the District Attorney or Assistant District Attorney representing the State of Louisiana in the Thirteenth Judicial District, that judgment be rendered herein granting the defendant, TERRY D. CAMPBELL, a new trial in accordance with law.

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STATE OF LOUISIANA — CRIMINAL DOCKET NUMBER 45,690-F

VS — 13TH JUDICIAL DISTRICT COURT

TERRY CAMPBELL — EVANGELINE PARISH, LOUISIANA

SENTENCING

MOTIONS

May 20, 1994

PRESENT: HONORABLE PRESTON N. AUCOIN,
DISTRICT JUDGE

RICHARD W. VIDRINE, Esquire, Assistant District Attorney, Post Office Box 780, Ville Platte, Louisiana 70586, representing the State of Louisiana;

RICHARD V. BURNES, Esquire, Attorney at Law, Post Office Box 650, Alexandria, Louisiana 71309, representing the defendant;

RAYMOND LEJEUNE, Esquire, Attorney at Law, 1401 Poinciana, Mamou, Louisiana 70554, representing the defendant;

TERRY CAMPBELL, Defendant.

BY THE COURT:

. . . Now, let's go to Number 3.

BY MR. BURNES, Counsel for Defendant:
Yes, Your Honor.

BY THE COURT:
Now, Number 3, Mr. Burnes, we went through that the first time round...

BY MR BURNES, Counsel for Defendant:
Yes, sir.

BY THE COURT:
...is when Dobie Gillis first came out. We had a big hearing concerning that. I'm sure you read it in the record already.

BY MR. BURNES, Counsel for Defendant:
Excuse me - when who came out, Your Honor. Did you say Dobie Gillis?

BY THE COURT:
Dobie Gillis case. You remember the case - was it Grant Parish?

BY MR. VIDRINE, Assistant District Attorney:
Sabine Parish.

BY THE COURT:
Yes, where there was no black foreman - where a black foreman had never been made - there was never a black foreman before and they said that counsel was ineffective in not finding that out and it was remanded. I've familiarized myself with those aspects of the case very well. But, I mean, I don't want to take away your right to argue but I did go into it in great detail.

BY MR. BURNES, Counsel for Defendant:
I'll try to be brief on it, Your Honor. This is one of the few pre-trial hearings that I didn't transcribe, but I did get the exhibits and talk to the attorney that was involved. I'd like to point out . .

BY THE COURT:
Certainly the court accepts the fact that there had never been a black person named as foreperson of a jury before that time. I mean you don't have to argue that because that was proven.

BY MR. BURNES, Counsel for Defendant:
Your Honor, one of the cases - the interesting thing in reviewing these cases there is reference to the Fourteenth Amendment. Well, the Fourteenth Amendment is both the due process clause and the equal protection clause. If you hunt for the due process clause and the equal protection clause you are going to find them both in the Fourteenth Amendment.

BY THE COURT:
That's the Johnson case you're talking about?

BY MR. BURNES, Counsel for Defendant:
Well, Your Honor, they cited the Johnson case.

BY THE COURT:
Johnson versus Puckett.

BY MR. BURNES, Counsel for Defendant:
Yes, and the reason I wanted to mention that is that they cited it, because by citing it when they have invoked the 14th Amendment they have involved both due process and equal protection. Now, there is some distinction, or they may have thought to be some distinction, in the historical development of this. For instance, in the Johnson vs Puckett case they refer to the Hobby case. A United States Supreme Court decision in which they did not give a relief and they said that the request there was under the nature of the due process of the 14th Amendment. But they said in the Johnson case we are looking at equal protection, which is also 14th Amendment but another section of the constitution. So, the reason that I am point out that we've hit that equal protection clause is because we have alleged the grounds that put us before you, not necessarily on the Hobby case, and incidentally the Hobby case, Your Honor had three descents. Now, I know that even if you

have a bare majority it is still a ruling but three descents indicate there well may be some problem with that being established law. Now, I think what you addressed the lawyers in the hearing you asked them, well, if you conceded that this grand jury is unconstitutionally impaneled as to a black person, why would it be unconstitutionally impaneled as to a white person. Good question. And, there are some answers to that Your Honor. One I think Peters versus Kiff, United States Supreme Court decision deals, I believe, that is with petit jurors, there they held in citation of that is 407, U.S. 493, 33 Lawyers Edition 83, 92 Supreme Court 2163 and it is a 1972 decision. They held that the indictment and conviction of a white man he could complain that neqroes were excluded, arbitrarily excluded. Now, besides that case by way of comparison if you look at Taylor versus Louisiana. For a long time in Louisiana we never had women on the jury unless they came down and volunteered. Of course, I filed a motion to quash a case one time and it got to the Louisiana Supreme Court and I lost by one vote and right after that I thin this case came out, and it says that a man can complain about that discrimination - has standing to complain because it denied him the cross section of the community. There was a case that came out that said the women can complain and a man can complain. Now, if a man can complain that a woman has to go down and volunteer to be on - which is not the law now. It used to be strange to see a woman on the jury. But, if a man cam complain that he is not part of that class or part of that group, then the same analogy would apply on racial exemptions or exclusions. More than that, Your Honor, Johnson vs Puckett reflected what is happening in the jurisprudence. They set it out in there. Besides the equal protection claim is the harm to society. You don't have to be a member of that group. It says the injury to equal protection caused by racial discrimination in the selection of members of a grand jury is not limited to the defendant.

BY THE COURT:

But, don't you think all of this is designed to avoid prejudice to the defendant? Isn't that the underlying basis and the underlying foundation for all of this?

BY MR. BURNES, Counsel for Defendant:

Judge, it is designed just like when we started our integration here awhile back in our schools. Now, I think we are at a 40th anniversary or something of that. It started now to where you say we are now protecting the system. There are cases that are saying that and Johnson says it. They put it on the equal protection clause and we put ourselves in Johnson in this case and we're saying that the system is wrong. How can you have a grand jury that says we can indicate black men and another grand jury constitute another way we can indictment white men. No, you can't, your Honor. It is either an invalid grand jury or it isn't. Your Honor, going back to Code of Criminal Procedure Article 872, to have a valid sentence you have to have a valid statute, a valid indictment, and a valid plea of guilty or judgment of conviction and this is not a valid indictment. It was returned by an unconstitutionally constituted grand jury. Again, law - we never get it all aligned, Your Honor.

BY THE COURT:

That's right.

BY MR. BURNES, Counsel for Defendant:

We can't. They put it on us. And the older we get the more we have to learn. Maybe years ago this didn't make a difference, but since 1991 it has, at least as far as this Johnson versus Puckett case is. Now they are talking about not the individuals group but the harm to society. That gets around, Your Honor, like those thats an objection, and its a reverse and that's an objection to where if you are excluding white people you can object whether you are a member of that group or not. Because, and what they are saving, the use the same language. They opened up this Johnson versus Puckett and they are talking about what equal protection means. It is not just that you are a member of that group. But, the harm to society. In other words you get that cross section, you get a fair grand jury. And, I'm not taking away from anything that was said at the other hearing, but I know, Your Honor, questioned the lawyers and they may well have responded adequately. I don't know. But, I ask them and they say that is what the judge was

saying, well, why is it not that group. That is why I dug out this Taylor case and that Peters case and why I analyze this Johnson versus Puckett case and realize the difference in due process and equal protection and this broadened concept of equal protection which means a harm to society. In other words, Your Honor, is to protect society's right of equal protection by saying you cannot - not Your Honor but the system - I know you didn't set it up wrong, but it is kind of inherited and passed down and this is the rule and we have to follow it. We have made a timely motion and based on that we submit that the motion to quash should have been granted. If it is granted then we are back to ground zero.

BY THE COURT:

Mr. Vidrine.

BY MR. VIDRINE, Assistant District Attorney:

Your Honor, we would adopt the argument that was made at the hearing when this first came up when Mr. Small was representing the...

BY THE COURT:

When Dobie Gillis came out.

BY MR. VIDRINE, Assistant District Attorney:

That is correct, Your Honor, the Sabine Parish case. In addition to that, Your Honor, we would simply say that in a case not too long ago, State versus Davis Second Circuit, February of this year, 1994, they referred to the Johnson versus Puckett case and in that case the court said, "In brief Davis argues that the statistical evidence from the records of the Registrar of Voters shows that between '71 and '91, 86.7% of the grand jury foremen were white and 13.3% black. He contends that this establishes a pattern of discrimination that violates equate protection" as argued by Mr. Burnes. Then the court said, "This court recently analyzed Caddo Parish's procedure for selecting jury foremen in State versus Thomas. We found that while the group against whom discrimination is asserted is a recognizable distinct class singled out for different treatment. The defendant did not prove what he needed

to prove." But, again it shows you that it has to be a distinct recognizable group and that is the same basis upon which Your Honor made the ruling earlier.

BY THE COURT:

All right. I'm prepared to rule. on Paragraph 3 of the Motion for a New Trial. This is the Court's ruling. Since Terry D. Campbell is a white person this court holds that the fact that at the time he was indicted that there had never been a black person named as a grand jury foreman in Evangeline Parish Louisiana, which incidentally is no longer the case, as ya'll know, that that does not constitute a violation of Mr. Campbell's constitutional rights including a due process violation. The court has already ruled in a similar motion with ample reasons being a motion to quash the indictment which was filed by Mr. Mike Small when he represented Mr. Campbell the first time around. The ruling is already in the record. The court adopts it by reference in ruling on this motion. Thank you. Proceed with Number 4 of the motion for a new trial.

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. *NO.* 95-K- 0824

TERRY CAMPBELL

- - - - - - - -

IN RE: Terry Campbell; Defendant; Applying for Rehearing of this Court's Order dated October 2, 1995; Court of Appeal Third Circuit Number CR94-11401; Parish of Evangeline 13th Judicial District Court Division "A" Number 45,690

- - - - - - - -

November 3, 1995
Rehearing denied.

JCW
PFC
WFM
HTL
CDK
BJJ
JPV

Supreme Court of Louisiana
November 3, 1995

S/ Frans J. Labranche, Jr.
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For the Court

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STATE OF LOUISIANA

No. 94 01140

Versus

TERRY CAMPBELL

BEFORE: JCP MTA MGS

ORDER

The Application for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby,

DENIED.

Lake Charles, Louisiana.

JUNE 7, 1996

S/JCP
S/MTA
S/MGS
Judges

Kenneth J. deBlanc
Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be . . . deprived of . . . liberty, . . . without due process of law; . . . .

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

28 U.S.C. § 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the

> United States, or where any title, right privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Louisiana Code of Criminal Procedure, Article 8, provides:

> Unless the context clearly indicates the contrary, official titles, such as clerk of court, coroner, district attorney, and sheriff, include assistants and deputies.

Louisiana Code of Criminal Procedure, Article 413, provides:

> A. The grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors, selected or drawn from the grand jury venire.
> B. In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.
> C. In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.
> D. The first and second alternates shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415.

Louisiana Code of Criminal Procedure, Article 648, provides, in pertinent part:

A. The criminal prosecution shall be resumed unless the court determines by clear and convincing evidence that the defendant does not have the mental capacity to proceed.
. . .

Louisiana Code of Criminal Procedure, Article 652 provides:

The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence.

Louisiana Revised Statute 14:30 provides:

A. First degree murder is the killing of a human being:
(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnaping, second degree kidnaping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery.
(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given or has received anything of value for the killing.
(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty -five years of age or older.
(6) When the offender has the specific intent to kill or to inflict great bodily harm while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(7) When the offender has specific intent to kill and is engaged in the activities prohibited by R.S. 14:107.1(C)(1).
B. For the purposes of Paragraph A(2) of this section, the term "peace officer" means any peace officer, as defined in R.S. 40:2402, and includes any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement agent, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

. . .

Louisiana Revised Statute 14.30.1 provides:

A. Second degree murder is the killing of a human being:
(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

. . .

Louisiana Revised Statute 14.31 provides:

A. Manslaughter is:
(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood has actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or
(2) A homicide committed, without any intent to cause death or great bodily harm.
(a) When the offender is engaged in the perpetration

or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Article 30 or 30.1

. . .

CRIMINAL DOCKET NO. 45,690-F

Jul 11 153 PM 194

STATE OF LOUISIANA	: 13TH JUDICIAL DISTRICT COURT
VERSUS	: PARISH OF EVANGELINE
TERRY D. CAMPBELL	: STATE OF LOUISIANA
Filed:_____	: _____ Dy Clk

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1

The trial Court erred in overruling the Motion to Quash Grand Jury Indictment because defendant was charged with a Grand Jury Indictment which was returned by a Grand Jury which was illegally and unconstitutionally selected in that the Grand Jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States constitutional provisions.

ASSIGNMENT OF ERROR NO. 2

The trial Court erred in ruling on the issue of defendant's present capacity to proceed for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him and assist in his defense remained with him throughout the proceedings and exist to this date.

ASSIGNMENT OF ERROR NO. 3

The trial Court erred in overruling defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by

Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial, and in overruling defendant's oral Motion to Limit Expert Witnesses.

ASSIGNMENT OF ERROR NO. 4

The trial Court erred in overruling defendant's written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress.

ASSIGNMENT OF ERROR NO. 5

The trial Court erred in ruling during the course of the trial on defendant's oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause).

ASSIGNMENT OF ERROR NO. 6

The trial Court erred when it refused to give refused to give defense requested jury charges number 2. 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

ASSIGNMENT OF ERROR NO. 7

The trial Court erred when it refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

ASSIGNMENT OF ERROR NO. 8

The trial Court erred when it overruled defendant's written objections to the proffered general jury charges which said objections were tendered to the Court timely in a document entitled

"Defense Objections to Proffered General Jury Charges." More specifically, the Court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the Court's general charge did not specify the enumerated or nonenumerated felonies nor did the Court's general charge define the enumerated or nonenumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

ASSIGNMENT OF ERROR NO. 9

The trial Court erred in failing to sustain defendant's objections to the proffered general jury charges.

ASSIGNMENT OF ERROR NO. 10

The trial Court erred in overruling defendant's Motion for New Trial.

ASSIGNMENT OF ERROR NO. 11

The trial Court erred in overruling defendant's Motion for Post-Verdict Judgment of Acquittal.

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FILED
JUN 20 1997
OFFICE OF THE CLERK

No. 96-1584

In the

Supreme Court of the United States

October Term, 1996

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ of Certiorari
To the Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545 (1979), to bring an equal protection claim based upon the exclusion of blacks from service as state grand jury foremen?

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II. A perceived conflict of the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), with *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), does not, *ipso facto*, mean that petitioner is entitled to this Honorable Court's supervisory review, especially where the state court decision is consistent with prior Supreme Court decisions 13

III. Any perceived conflict between *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) and other decisions of the United States Court of Appeals, Eleventh Circuit, disappears when one considers that the latter decisions predated *Hobby v. United States*, 468 U.S. 339 (1984) 15

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IV. If this Honorable Court should invoke its supervisory jurisdiction and review the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), such review should be limited to only the equal protection claim under *Rose v. Mitchell*, 443 U.S. 545 (1979) 18

V. Petitioner has utterly failed to establish that the Louisiana Supreme Court's writ denial of the lower court's ruling in *State of Louisiana v. Terry Campbell*, 673 So. 2d 1061 (La. Ct. App. 3d Cir. 1996), *writ denied*, 685 So. 2d140 (La. 1997), relied upon holdings inconsistent with decisions of this Honorable Court in order to justify supervisory review under Rule 10 (c) 20

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No. 96-1584

In the

Supreme Court of the United States

October Term, 1997

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ of Certiorari
To the Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On February 4, 1992, petitioner Terry Campbell, a white male, was indicted by the Grand Jury of the Thirteenth Judicial District, Parish of Evangeline, State of Louisiana, in the shooting death of James L. Sharp, also a white male, on January 11, 1992; petitioner was formally charged with second-degree murder in violation of La. R.S. 14:30.1 under Docket No. 45-690-F. (*See* Record at 19-20, hereinafter R. at __). The Honorable Preston Aucoin, Judge, Thirteenth Judicial District, Parish of Evangeline,

signed an arrest warrant and supporting affidavit for petitioner the same day of the shooting, which further ordered "that Gary Ortego, Attorney At Law, be (sic) and he is hereby appointed to represent Terry Campbell, said representation to began (sic) immediately (sic) and to cover all aspects of these proceeding (sic)." R. at 21-22, 317-318, 333-334. During petitioner's first trial in January 1994, and at the request of defense counsel, J. Michael Small, the trial judge explained to the jury the unusual order in the arrest warrant as being given because, at the time of his arrest, petitioner was a patient at a psychiatric hospital. (R. 542-545.) See *Appendixes at G-1* (hereinafter *App. at ___*). The arresting officers made no attempts to contact Mr. Ortego; however, Evangeline Parish Sheriff's Investigator Jack Aucoin read the warrant to petitioner including the language referencing the appointment of Mr. Ortego. (R. 339)

During transportation from Lafayette, Louisiana, to Ville Platte, Louisiana, and after being orally advised of his rights twice under *Miranda v. Arizona*, 384 U.S. 436 (1966), petitioner made certain spontaneous statements in the presence of Pine Prairie Police Chief L.C. Deshotel and Investigator Aucoin.[1] (R. 316, 318, 337)

[1] While being transported from Lafayette to Ville Platte, petitioner made the following spontaneous statements in the presence of Officer Deshotel and Investigator Aucoin: at approximately 5:40 p.m., petitioner stated: "I sure made a big mistake." At approximately 5:45 p.m., petitioner stated: "What would you do if someone tried to pass on you with a van?" At approximately 5:50 p.m., petitioner stated: "I told Dr. Cole that I wish it was me, not that man." At approximately 6 p.m., petitioner stated: "Where's my gun? Mr. L.C., do you know where my gun is? Boy that 357 is a nice shooting gun." At approximately 6:15 p.m., petitioner stated: "I just jumped out of the way; he tried to run over me, so I shot him. All I wanted to do was talk to the man, but he tried to run over me. I am sorry for what I did. I only wanted to scare him, not kill him." (R. 44-45) At 6:45 p.m. petitioner executed a written *Miranda* rights form at the Evangeline Parish Sheriff's Office. (R. 48, 320-321, 378-379)

Petitioner indicated he understood his rights, declined to make any statements, and was not subjected to interrogation. (R. 319-320) On May 28, 1992, then-defense counsel Mr. Small filed a *Motion To Suppress Inculpatory Statements* asserting that the spontaneous statements violated petitioner's Fifth Amendment right against self-incrimination and that because of a mental defect, petitioner could not knowingly, voluntarily and intelligently waive his Fifth Amendment right. (R. 58-59)

Petitioner was initially arraigned on the second-degree murder indictment on March 6, 1992, and entered a plea of not guilty. By formal written motion, defense counsel on June 2, 1992, motioned the trial court to change the plea from not guilty to not guilty and not guilty by reason of insanity. (R. 61-62) Petitioner was once again arraigned on July 16, 1992, at which time the State of Louisiana, then represented by former Assistant District Attorney Richard Vidrine, on behalf of former Thirteenth Judicial District Attorney J. William Pucheu, moved for the appointment of a sanity commission. (R. 3) In a formal order signed on July 16, 1992, Judge Aucoin appointed Drs. Phillip Landry and Charles Fontenot "to make an examination as to the defendant's mental condition at the time of the alleged offense, the defendant's present capacity to proceed, the defendant's capacity to understand the proceedings against him, the defendant's ability to assist in his defense, and his need for inpatient hospitalization in the event he is found incompetent." (R. 64) Following a hearing on January 8, 1993, the State and the defense stipulated to the introduction into evidence of the reports

filed by Drs. Landry and Fontenot. (R. 250) The trial court then concluded that petitioner was in need of further evaluation and ordered that petitioner be "committed to the Feliciana Forensic Facility at Jackson, Louisiana, as an inpatient, for treatment and psychiatric evaluation concerning his mental capacity to proceed in this case, as well as his mental condition at the time of the alleged offense..." (R. 74, 250-253)

In a letter dated April 6, 1993, officials at the Feliciana Forensic Facility (FFF) notified the trial court that petitioner was competent to proceed. *See App. at E-1 through E-3.* The trial court thereby issued an order on April 7, 1993, finding the State and the defense had stipulated to the FFF reports, which had determined petitioner "is presently able to understand proceedings against him and to assist in his defense". Accordingly, the trial court ordered petitioner returned to court for further proceedings. (R. 76). Upon motion of the State, and over the objection of the defense, the trial court then ordered Drs. Richard L. Gibson and Jay C. Pennington to examine petitioner as to "defendant's mental condition at the time of the alleged offense." (R. 86-87)

On December 2, 1993, Mr. Small, on behalf of the defendant, filed a motion entitled *Supplemental Motion To Suppress* claiming that the spontaneous statements should be suppressed as fruits of an illegal arrest. (R. 172-173) A hearing was held on petitioner's motion to suppress and supplemental motion to suppress on December 2, 1993, and both motions were denied. (R. 175, 313, 398) *See also App.* at F-1 and F-2.

Prior to trial, petitioner, through defense counsel Jesse B. Hearin, filed a *Motion To Quash Grand Jury Indictment* in the trial court, alleging that the indictment was defective because "the grand jury foreperson selection

process in Evangeline Parish is discriminatory and violates the Sixth and the Fourteenth Amendment to the United States Constitution..." *See Petition For A Writ Of Certiorari* at Appendixes, F-2 and F-3 (hereinafter *Pet.'s App. at* ____) Following a hearing on the motion on December 2, 1993, Judge Aucoin denied the motion; subsequently the trial court issued a written judgment on December 6, 1993, confirming the denial of the motion to quash. *See Pet.'s App.* at G-1 through G-34, H-1 through H-2.

Petitioner's first trial in January 1994 ended in a joint motion for a mistrial. (R. 9-11) A second trial was held from May 9 through May 12, 1994. (R. 12-15) New counsel for the petitioner, Richard V. Burnes and Raymond J. LeJeune, filed *Defense Objections To Proffered General Jury Charges*, claiming, *inter alia,* that a definition of manslaughter should be omitted "for the reason that the case does not involve a manslaughter with a non-enumerated felony (that is, felony not enumerated in Article 30 or Article 30.1) or an intentional misdemeanor and there is no evidence or allegations that the defendant was resisting a lawful arrest." (R. 190-192) Defense counsel also objected to the trial court's jury charge regarding specific intent, and requested a special instruction. The trial court rejected both requests; the jury charge read to the jury was filed into the record. (R. 202, 203-217)[2]. A twelve person jury voted unanimously to convict as charged. (R. 218)

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[2] Defense counsel requested the following instruction on specific intent: "However, the specific intent must exist at the time of the killing for the offense to constitute second degree murder. An intent to kill or to commit great bodily harm existing either before or after the time of the killing is not sufficient to constitute second degree murder if it did not exist at the time of the killing." (R. 202)

On May 20, 1994, a hearing was held on defense counsel's *Motion For A New Trial* and *Motion For Post Verdict Judgment Of Acquittal* based upon, *inter alia,* the alleged defect in the grand jury indictment, the alleged erroneous ruling regarding petitioner's motions to suppress, and the alleged defective jury charges on manslaughter and specific intent. *See Pet.'s App.* at I-1 through I-8. Both motions were denied, and petitioner was sentenced to the mandatory term of life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. (R. 18, 227-232, 236-237)

During the appeal to the Louisiana Court of Appeal, Third Circuit, through defense counsel Mr. Burnes and Mr. LeJeune, petitioner again asserted as Assignment of Error No. 1, the trial court's denial of the motion to quash the grand jury indictment. Petitioner also objected to the denial of his motion for new trial on that same basis.

In *State of Louisiana v. Terry Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995), the Louisiana Court of Appeal, Third Circuit, on March 1, 1995, in addressing petitioner's first assignment of error in Docket No. CR-94-1140, reversed the trial court's finding that petitioner, a white male, lacked standing to allege racial discrimination against blacks in the grand jury foreman selection process in Evangeline Parish. *See Id.*, 651 So. 2d at 413-414 and *Pet's. App.* at D-2 through D-5. The Louisiana Third Circuit had remanded the matter back to the trial court for an evidentiary hearing, finding that petitioner's statistical information was inadequate under *State of Louisiana v. Young*, 569 So. 2d 570 (La. Ct. App. 1 Cir. 1990), *writ denied*, 575 So. 2d 386 (La. 1991).[3] Given the ruling of

[3] The State of Louisiana also points out that petitioner's summarized data in his petition does not correspond exactly to the statistical data provided in the record. Compare Pet. at 13 to R.103 (Black Population for 3/31/82 is 4,591 in record; brief has it as 4,561.)

the Louisiana Third Circuit, that reviewing court did not reach petitioner's other assignments of error. *See Id.* and *Pet.'s App.* at D-5.

On March 31, 1995, the District Attorney for the Thirteenth Judicial District filed an application for writ of certiorari and review with the Louisiana Supreme Court; in an opinion issued on October 2, 1995, the Louisiana Supreme Court in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), *reh'g denied*, 661 So. 2d 1374 (La. 1995), granted the State's writ application in Docket No. 95-K-0824, and subsequently reversed the prior ruling of the Louisiana Court of Appeal, Third Circuit, in *State of Louisiana v. Terry Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995). The Supreme Court held that petitioner lacked standing under both the equal protection clause and the due process clause to bring a claim of racial discrimination in the selection of grand jury foremen under *Rose v. Mitchell*, 443 U.S. 545 (1979) and *Hobby v. United States*, 468 U.S. 339 (1984). *See also Pet.'s App.* at A-2 through A-8. The Supreme Court also remanded the case back to the Louisiana Court of Appeal, Third Circuit, for consideration of petitioner's remaining assignments of error. A petition for rehearing with the Louisiana Supreme Court was subsequently denied on November 3, 1995. *See Pet.'s App.* at K-1 and *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), *reh'g denied*, 661 So. 2d 1374 (La.1995).

On January 31, 1996, petitioner filed a *Petition For A Writ Of Certiorari* with this Honorable Court under Docket No. 95-1240, seeking review of the Louisiana Supreme Court's ruling denying petitioner standing to bring a *Rose* claim. Pursuant to a request for assistance by

former District Attorney Pucheu, the Attorney General filed *Respondent's Brief In Opposition To Petition For Writ Of Certiorari*. On May 13, 1996, this Honorable Court denied the petition. *See Pet.'s App.* at C-1 and *Terry Campbell v. Louisiana*, __ U.S. ___, 116 S.Ct. 1673 (1996).

Meanwhile, while the first petition to this Honorable Court was pending, the Louisiana Court of Appeal, Third Circuit, denied relief on petitioner's remaining assignments of error, and affirmed petitioner's conviction and sentence, with the exception of a remand to the trial court to amend the court minutes to reflect that petitioner would be credited for time served. *See State of Louisiana v. Terry Campbell*, 673 So. 2d 1061 (La. Ct. App. 3d Cir. 1996), *reh'g denied*, (La. Ct. App. 3d Cir. 6/7/96). On January 10, 1997, under Docket No. 96-1785, the Louisiana Supreme Court denied petitioner's application for writ of certiorari and/or review. *See State of Louisiana v. Terry Campbell*, 685 So. 2d 140 (La. 1997) and *Pet.'s App.* at B-1.

On April 2, 1997, petitioner submitted to this Honorable Court the instant *Petition For A Writ Of Certiorari*. The newly elected District Attorney for the Thirteenth Judicial District, C. Brent Coreil, formally recused his office based upon petitioner's representation by former defense counsel, Raymond Lejeune, who is now an Assistant District Attorney. *See App.* at A-1 and A-2. The undersigned was appointed as prosecutor of record. *Id.* Given the fact that the State of Louisiana had previously filed *Respondent's Brief In Opposition To Petition For Writ Of Certiorari* in the same matter under Docket No. 95-1240, the State filed an appearance form and waiver on behalf of the State of Louisiana. By letter dated May 23, 1997, the Clerk of this Honorable Court, William K. Suter, notified the State that a response had been requested filed on or before June 23, 1997. *See App.* at D-1.

SUMMARY OF ARGUMENT

In opposing the instant petition for writ of certorari, the State of Louisiana contends that the Louisiana Supreme Court's decision in *State v. Terry Campbell*, 661 So.2d 1321 (La.1995) is consistent with prior decisions of this Honorable Court. Additionally, any conflict between the *Campbell* decision and decisions of the Eleventh Circuit, U.S. Court of Appeals is clearly explained by the fact that those federal decisions cited by petitioner pre-date *Hobby v. United States*, 468 U.S. 339 (1984), and their validity today is highly questionable. Further, any conflict between the Fifth Circuit in *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983) and those decisions of the Eleventh Circuit also arise in that the latter decisions pre-date the *Hobby* decision. Finally, if this Honorable Court decides to invoke its supervisory jurisdiction, the State of Louisiana would respectfully argue that such review should be limited to the only federal question properly before this court, i.e., whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545 (1979) to bring a claim under the equal protection clause that blacks have been excluded from service as state grand jury foremen. Petitioner has also claimed this Honorable Court's supervisory jurisdiction should be invoked to review the following: erroneous admission of spontaneous statements under the Fifth and Sixth Amendments; erroneous jury charges under the due process clause of the Fifth and 14th Amendments, insufficient evidence to support a conviction based upon petitioner's evidence of insanity at time of the crime, and an abuse of discretion by the trial judge in finding petitioner competent to proceed. Petitioner has flatly failed to

demonstrate to this Honorable Court how any of these lower state court rulings are inconsistent with any decisions of this Honorable Court and that supervisory review is necessary.

ARGUMENT

I. Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), is consistent with decisions of this Honorable Court.

In the instant petition for writ of certiorari, petitioner once again claims that the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995) is flatly inconsistent with this Honorable Court's decisions in *Peters v. Kiff*, 407 U.S. 493 (1972) and *Powers v. Ohio*, 499 U.S. 400 (1991). *See Petition For A Writ Of Certiorari* at 9 (hereinafter *Pet. at* ____)

The State of Louisiana contends that the Louisiana Supreme Court decision is correct when viewed in light of this Honorable Court's decisions, and that the Louisiana Supreme Court correctly rejected petitioner's invitation to expand *Powers* beyond the context of an equal protection attack to race-based exclusions of prospective petit jurors through the use of peremptory challenges. *See State of Louisiana v. Terry Campbell*, 661 So. 2d at 1324.

In *Powers*, this Honorable Court held that a defendant, regardless of his or her race, had standing under the equal protection clause to object to the raced-based exclusion of any prospective petit juror whether or not that defendant and the excluded juror shared the same race.

Moreover, in *Peters v. Kiff*, *supra*, a plurality decision, this Honorable Court held that a white defendant had standing to object on the basis of the due process clause to racial composition of a grand and petit juries even though the claim centered on the allegations that blacks had been systematically excluded.

Given the fact that this Honorable Court **has not decided** whether a white defendant has standing under *Rose v. Mitchell*, *supra*, to bring an equal protection challenge to alleged racial discrimination against blacks in the context of a state grand jury foreman, the Louisiana Supreme Court was correct not to extend *Powers* beyond its equal protection holding. This is especially true in light of the Louisiana Supreme Court's own determination of its state grand jury system that "[t]he role of the grand jury foreman in Louisiana appears to be similarly ministerial"[4] , which was the same conclusion espoused by this Honorable Court in *Hobby*, *supra*, 468 U.S. 339 (1984) concerning the role of a federal grand jury foreman. *See State of Louisiana v. Terry Campbell*, 661 So. 2d at 1324; and *Hobby*, 468 U.S. at 344. *See also State of Louisiana ex rel. Williams v. Whitley*, 629 So. 2d 343 (La. 1993)(Marcus, J., dissenting, "[t]he role of the foremen of the grand jury in Louisiana also appears to be ministerial in nature.")

Given the holdings of *Powers* and *Peters*, the Louisiana Supreme Court was without express binding authority from this Honorable Court to grant petitioner the relief he was seeking. Furthermore, the Louisiana Supreme Court's decision is also consistent with *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)(Mexican-American

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[4] Whether or not the duties of a Louisiana grand jury foreman are ministerial would, in the first instance, be a question of state law best left for resolution by Louisiana courts. See La.C.Cr.P. art. 436. See also App. at H-5.

defendant had standing under the equal protection clause to object to the exclusion of Mexican-Americans as state grand jurors) and *Rose v. Mitchell*, 443 U.S. at 565, (black defendants had standing under the equal protection clause to challenge exclusion of blacks as state grand jury foremen)[5] in requiring that petitioner establish under the equal protection clause that the "procedures employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Accordingly, the Louisiana Supreme Court's decision is consistent with decisions of this Honorable Court.

While petitioner portrays his claim as falling on all fours with the *Powers* and *Peters* decision, he continues to ignore the basic premise of the *Castaneda* and *Rose* decisions that the complaining party of the grand jury or grand jury foreman selection process demonstrates **"a substantial underrepresentation of his race or of the identifiable group to which he belongs**." (Emphasis added.) His complaint is that the Louisiana Supreme Court refused to establish a new federal rule. To the contrary,

[5] Petitioner continues to misconstrue the *Rose* holding by stating that in *Rose* this Honorable Court "held that racial discrimination in the selection of grand jury foremen violates the Fourteenth Amendment to the United States Constitution and requires reversal of a state conviction." *Pet.* At 15. While it is clear from the *Rose* decision that discrimination against blacks in the selection of grand jury foremen violates the equal protection clause of the Fourteenth Amendment, it is not clear that such discrimination warrants reversal of a subsequent conviction. This Honorable Court has never decided what the remedy would be, in that this Court in *Rose* held that the black petitioners had not established a *prima facie* case of discrimination, and therefore the attack failed. In *Rose*, this Honorable Court "assumed, without deciding, that invidious discrimination in the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire jury venire." *Id.*, 443 U.S. at 551 n. 4 (Citations omitted)

petitioner must demonstrate to this Court under Sup.Ct. Rule 10 (c) that a state court "has decided an important question of federal law that has not been, but should be, settled by this Court..." The State of Louisiana responds herein that the Louisiana Supreme Court did not decide a new rule of federal constitutional law yet undecided by this Honorable Court. The Louisiana Supreme Court's expressly rejected petitioner's invitation to do just that. Instead, the Louisiana Supreme Court decided petitioner's case in a manner entirely consistent with the present decisions of this Court. For this reasons, petitioner has not established a basis for invoking this Honorable Court's supervisory jurisdiction.

II. A perceived conflict of the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), with *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), does not, *ipso facto*, mean that petitioner is entitled to this Honorable Court's supervisory review, especially where the state court decision is consistent with prior Supreme Court decisions.[6]

[6] Petitioner cites *Bowen v. Kemp*, 769 F. 2d 672 (11th Cir. 1985), cert. Denied, 478 U.S. 1021 (1986), as a federal appeals decision that conflicts both with *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995 and *United States v. Cronn*, 717 F. 2d 164 (1983). *Pet.* At 11-12. The State of Louisiana fails to comprehend this argument given that in *Bowen*, the issue before the federal court revolved around an equal protection claim concerning the exclusion of women from petit jury service. The instant claim before this Honorable Court deals only with an equal protection claim based upon a state's grant jury foreman selection process. Petitioner had not ever claimed discrimination in the selection process of either state grand juries or state petit juries. Accordingly, a federal decision not on point with the instant claim could

Petitioner claims that the Louisiana Supreme Court decision in question here conflicts with *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), and thereby, this Court should invoke supervisory review. *Pet.* at 3, 11. The United States Court of Appeals, Eleventh Circuit, in *Sneed* did not distinguish between discrimination in the selection of a state grand jury foreman and discrimination in the selection of a state grand jury itself. Rather, the Eleventh Circuit in *Sneed* dealt only with a federal defendant's claim against the federal grand jury foreman selection process, and subsequently extended holdings of this Honorable Court dealing with discrimination in the selection of grand juries to consider a claim of discrimination in the selection of grand jury foremen. Moreover, the *Sneed* court was bound by clear precedent in the Eleventh Circuit, *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982) and *United States v. Perez-Hermandez*, 672 F. 2d 1380 (11th Cir. 1982) As argued below, all of these federal decisions were issued **prior** to *Hobby v. United States, supra*. Furthermore, there is no indication in *Sneed* that an issue before that federal appellate court was whether a white defendant could bring a claim of racial exclusion of blacks in a state grand jury foreman selection process. The *Sneed* decision clearly centered upon a federal defendant attacking his federal conviction due to alleged discrimination in the selection of federal grand jury foremen.

Most importantly, the Eleventh Circuit today may possibly retreat from this line of prior decisions given this Court's binding precedent in the *Hobby* case. *See Sneed*, 729 F. 2d at 1335 n. 3 (finding federal grand jury foreman

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hardly create the necessary "conflict" by which this Honorable Court invokes supervisory review pursuant to Sup.Ct.Rule 10.

to be constitutionally significant). Accordingly, given this Court's decision in *Hobby* on a due process claim concerning federal grand jury foremen, and this Court's decisions under the equal protection clause of *Castaneda* and *Rose*, there is no outstanding conflict that has not already been resolved.

Even if *Sneed* could be legitimately interpreted to conflict with the ruling of the Louisiana Supreme Court a conflict alone is insufficient in and of itself to grant supervisory relief. *See Ramirez v. California*, 476 U.S. 1152 (1986)(J. White, dissenting, joined by J.J. Brennan and Powell), wherein this Honorable Court denied a petition for writ of certiorari despite the opinion of dissenting Justices that a conflict existed between a Fifth Circuit Court of Appeals decision and a California Supreme Court decision, and between the latter decision and a Supreme Court decision. *See also Green Bay Packaging, Inc., v. Adams Extract Company*, 473 U.S. 911 (1985) (J. White, dissenting in the denial of a petition for writ of certiorari because of a conflict between decisions of the Fourth and Fifth Circuits of the United States Court of Appeals).

Accordingly, petitioner has failed to clearly demonstrate that relief is warranted on the basis that the Louisiana Supreme Court's decision is in direct conflict with Eleventh Circuit decisions.

III. Any perceived conflict between *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) and other decisions of the United States Court of Appeals, Eleventh Circuit, disappears when one considers that the latter decisions pre-dated *Hobby v. United States*, 468 U.S. 339 (1984).

Petitioner further claims that review by this Honorable Court is warranted given that *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984),[7] conflicts with the following decisions of the United States Court of Appeals, Eleventh Circuit: *Bowen v. Kemp*, 769 F. 2d 672 (11th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *United States v. Perez-Hernandez*, 672 F. 2d 1380 (11th Cir. 1982)(*per curiam*); *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982); and *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984). *Pet.* at 3, 11.

While these decisions, except for *Bowen* as previously explained *infra*, may appear to be in conflict with *Cronn*, all these decisions cited by the petitioner were issued **without the benefit of Hobby v. United States,** supra, and dealt with the issue of a federal grand jury foreman, not a state grand jury foreman. (See P. 15, n. 5 *infra*) In light of the *Hobby* decision, the continued validity of these Eleventh Circuit decisions is highly questionable. Accordingly, those same federal courts would be bound by the *Hobby* precedent. As such, intervention by this Honorable Court to resolve what the petitioner claims is an apparent conflict is clearly not necessary. An examination of the cited federal case law by the instant petitioner shows that the petitioner's claim of conflict is clearly illusory.

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[7] Petitioner also cites *James v. Whitley*, 39 F. 3d 607 (5th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 1704 (1995), as a "case involving issues similar to the case *sub judice*, the state conceded that the petitioner had established that blacks are a recognizable distinct class that receives different treatment under the laws as written or applied" *Pet.* at 17. Petitioner fails to mention to this Honorable Court that the habeas petitioner in *James* was black who was attacking the state grand jury foreman selection process in St. James Parish on a claim that blacks were unlawfully excluded from service. Therefore, standing was not an issue in the *James* case.

In *United States v. Perez-Herandez*, 672 F. 2d 1380 (11th Cir. 1982)(*per curiam*), decided on April 15, 1982, the Eleventh Circuit held that a hispanic defendant had standing under the equal protection clause to object to the exclusion of blacks and women from service as federal grand jury foremen. It is also noteworthy that the Eleventh Circuit in *Perez-Hernandez* also rejected the government's argument that the role of a federal grand jury person is "constitutionally insignificant." *Id.* at 1386. *Contrast Hobby*, *supra*, decided on July 2, 1984, finding the role of a federal grand jury foreman as simply ministerial and without constitutional importance. The Eleventh Circuit also placed heavy reliance on *Peters v. Kiff*, *supra*, even though that decision was based upon the due process clause as opposed to the equal protection clause.

In *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982), decided on July 22, 1982, the 11th Circuit obviously felt bound by *United States v. Perez-Hernandez*, *supra*, when it held that a white defendant had standing to complain about the exclusion of blacks and women from service as federal grand jury foremen. That Court stated: "...The panel [in *United States v. Perez-Hernandez*] reached that conclusion [of standing] despite its acknowledgment of prevailing Supreme Court precedent which would appear to deny standing to such a defendant...In accord with our existing precedent, we find standing on the part of the instant appellants." *Id.*, 680 F. 2d at 1355-1356.

Likewise, *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), decided on April 16, 1984, cites the binding precedent of *United States v. Holman* and *United States v. Perez-Hernandez* for its decision.

The State of Louisiana contends that petitioner has plainly failed to establish to this Honorable Court any viable conflict in the lower federal circuits. All the cited

Eleventh Circuit decisions pre-date the *Hobby* decision, and therefore have been resolved by this Honorable Court to deny a white petitioner standing on a *Rose* claim. Given the holdings of *Hobby*, *Castaneda* and *Rose, supra*, the federal appellate decisions cited by the petitioner fail to prove a jurisdictional basis by which a petition for writ of certiorari should be granted.

IV. If this Honorable Court should invoke its supervisory jurisdiction and review the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), such review should be limited to only the equal protection claim under *Rose v. Mitchell*, 443 U.S. 545 (1979).

Petitioner claims that the questions presented for review include three federal bases for relief: the equal protection clause, the due process clause and the fair cross-section requirement of the Sixth Amendment. *Pet.* at *i*. The State of Louisiana counters that the only possible federal question left unresolved for this Honorable Court is whether a white defendant has standing under *Rose* to bring an equal protection claim based upon the exclusion of blacks from a state's selection process for grand jury foremen.

Petitioner's claim that a white defendant has standing to bring a due process attack is foreclosed by this Court's decision in *Hobby, supra*. Considering the Louisiana Supreme Court's *dicta* that a Louisiana grand jury foreman's role is ministerial, petitioner's request for relief squarely runs counter to the *Hobby* decision. For the petitioner to distinguish *Hobby* based upon a claimed difference in the selection of a grand jury foreman in the

federal system as opposed to the selection of a grand jury foreman in the Louisiana system, clearly rings hollow when the petitioner himself has deliberately chosen not to attack the Louisiana grand jury venire from which his Louisiana grand jury was chosen. Moreover, the Louisiana Supreme Court in *State of Louisiana v. Mouton*, 395 So. 2d 1337 (La. 1981), *cert. denied*, 454 U.S. 850 (1981), upheld the state statutes governing the selection of grand juries in Orleans Parish, whereby the district judge picks each of the 12 grand jurors from the grand jury venire. In *Mouton*, the Louisiana Supreme Court affirmed that La.C.Cr.P. arts. 412, 413, and 414 and La.R.S. 15:114 do not violate the federal due process or equal protection clauses because the defendant had failed to establish an affirmative showing that the system was discriminatory. *See also App.* at H-2 through H-5. In the petitioner's case, applicable Louisiana statutes allow district judges of parishes other than Orleans Parish to chose only the grand jury foreman from the grand jury venire; the remaining 11 grand jurors and two alternates are picked randomly and by lot. *See App.* at H-4. In light of *Mouton*, petitioner's claim that allowing a district judge to select the grand jury foreman necessarily taints the grand jury itself has no merit. Moreover, the argument fails to account for petitioner's own decision to forego an attack on the Louisiana's system of selecting the grand jury itself. Accordingly, review on the due process claim should be denied.

Finally, petitioner claims he is entitled to federal review on a fair cross-claim analysis under the Sixth Amendment. The State of Louisiana counters that this federal claim has not been heretofore addressed by the state courts in question. A review of the record herein demonstrates that the state courts did not rule on petitioner's Sixth Amendment fair cross-section claim,

given the fact that the focus was on petitioner's standing to bring either an equal protection attack or a due process attack upon the grand jury foreman selection process itself. Further, the record before this Honorable Court does not demonstrate that the petitioner adequately represented a Sixth Amendment fair cross-section claim as an adequate basis for relief before the state courts. Given this Honorable Court's policy considerations that state courts should be given the first opportunity to consider the application of state statutes in light of federal constitutional challenges, this Court's review on this basis is not warranted. See Robert L. Stern *et al.*, *Supreme Court Practice* at 117 (7th ed. 1993).

Moreover, authority which petitioner himself cites to this Honorable Court notes in *dicta* that a grand jury foreman attack is not by its nature subject to the Sixth Amendment's requirement of a fair cross-section. *See Sneed, supra*, 729 F. ed at 1335 n.

> 2: "[a]lthough the composition of a grand jury or petit jury venire may be challenged under the sixth amendment's guarantee of a right to be tried by a group drawn from a source representing a fair cross-section of the community...this requirement does not extend to the office of grand jury foreperson because '[o]ne person alone cannot represent the divergent views, experience, and ideas of the distinct groups which form a community.' (Citations omitted.)"

As such, no reason exists to review petitioner's alleged claim under the Sixth Amendment fair cross-section requirement.

V. Petitioner has utterly failed to establish that the Louisiana Supreme Court's writ denial of the lower court's ruling in *State of Louisiana v. Terry Campbell*, 673 So. 2d 1061 (La. Ct. App. 3d Cir. 1996), *writ denied*, 685 So. 2d 140 (La. 1997) relied upon holdings inconsistent with decisions of this Honorable Court in order to justify supervisory review under Rule 10 (c).

A. Denial of petitioner's motions to suppress spontaneous statements under the Fifth Amendment:

Petitioner claims that this Honorable Court should grant his petition for writ of certiorari to review the denial of his motions to suppress his spontaneous statements under the Fifth Amendment. *Pet.* at *i.*, 18-20. He cites no authority to indicate that any lower state court ruling is inconsistent with decisions of this Honorable Court.

The Third Circuit for the Louisiana Court of Appeal ruled that the trial court had correctly denied petitioner's motion to suppress. *See Pet.'s App.* at E-9 to E-13 and *State v. Terry Campbell*, 673 So. 2d at 1066-1068. In so doing, the Louisiana Third Circuit correctly relied upon *Michigan v. Mosley*, 423 U.S. 96 (1975).

The Louisiana Third Circuit's ruling is clearly consistent with the *Mosley* decision. The record in this matter clearly shows that petitioner's inculpatory statements were made of his own volition and not in response to police interrogation. The Louisiana Third Circuit wrote: "Clearly under the precepts of Michigan v. Mosley, these officers scrupulously honored Campbell's right to cut off questioning. He cannot now assert that his right to remain silent was violated, because no further interrogation occurred. Campbell apparently changed his mind and voluntarily decided to make the statements at issue. Nothing

in Miranda prevents a defendant from changing his mind about giving a statement." *Id.*, 673 So. 2d at 1068.

The Louisiana Third Circuit also correctly ruled that petitioner's statements were knowingly, intelligently and voluntarily made. The record supports the Louisiana Third Circuit's finding that although defense expert Dr. Jimmie Cole testified petitioner was, in his opinion, mentally incompetent on the date of those statements, Dr. Cole also testified on cross-examination that petitioner signed a "formal voluntary admission" that same day when he was admitted to the hospital, and that a person "would not be admitted unless they had the mental capacity to make such" a voluntary admission. *Id.*, 673 So. 2d at 1067.

Moreover, the record supports the Louisiana Third Circuit's finding that petitioner had sufficient mental capacity to understand the rights as explained to him. Dr. Cole testified that petitioner also signed a consent form to surgery, that petitioner knew what was going on "to some degree", and that medication did not prevent petitioner's statements from being free and voluntary. (R. 359-361) Further, Dr. J.C. Pennington testified in his opinion that petitioner's statements were free and voluntary. (R. 370) This Honorable Court in *Colorado v. Connelly*, 479 U.S. 157 (1986) held that a confession can be free and voluntary even though an accused suffers from a mental defect. The State of Louisiana herein has freely acknowledged and could never dispute that petitioner suffers from organic brain damage due to an accident he suffered in 1986. However, as this Honorable Court and Louisiana courts have longtime recognized, an accused's mental illness or mental condition alone does not mean he can never give a free and voluntary
statement. *See Connelly, supra*, and *State of Louisiana v. Brown*, 414 So. 2d 689 (La. 1982).

Accordingly, review by this Honorable Court on petitioner's Fifth Amendment claims is clearly not necessary.

B. Denial of petitioner's motions to suppress his spontaneous statements under the Sixth Amendment:

Petitioner further claims this Honorable Court should invoke its supervisory jurisdiction to review a denial of his Sixth Amendment rights resulting from the admission into evidence of his spontaneous statements.

The record is clear on this point that petitioner's statements were made on the date of his arrest on January 12, 1992, and that formal charges were not brought until the date of his indictment on February 4, 1992. (R. 19-20, 316, 318, 337)

The Louisiana Third Circuit correctly ruled that petitioner's claim of error on this basis was flatly without merit, citing *Moran v. Burbine*, 475 U.S. 412 (1986), finding that the prosecution in the instant matter had yet to commence, and therefore, petitioner's rights under the Sixth Amendment has not yet attached. *See State of Louisiana v. Terry Campbell*, 673 So. 2d at 1068. The Louisiana Third Circuit ruling is also consistent with *Kirby v. Illinois*, 406 U.S. 682 (1972), wherein this Honorable Court recognized that the Sixth Amendment right to counsel only attaches at the point where adversarial criminal prosecution begins.

Accordingly, petitioner provides no support for a finding that the Louisiana Third Circuit's ruling on the Sixth Amendment claim is inconsistent with this Honorable Court's binding precedent. *Pet.* at 20-21. Supervisory

review is clearly not warranted.

C. Denial of petitioner's requested jury charges:

Petitioner again claims this Honorable Court should invoke its supervisory jurisdiction to review the Louisiana Third Circuit's ruling finding that the trial judge had correctly denied defense counsel's specific requests regarding jury instructions on specific intent and manslaughter. *Pet.* at *i.*, 27-29.

The Louisiana Third Circuit ruled that the trial court adequately charged the jury on the issue of intent, finding that the instructions, taken as a whole, were sufficient. *Id.*, 673 So. 2d at 1070. Because petitioner's defense to the crime was based on a lack of intent due to his alleged insanity, the Louisiana Third Circuit affirmed the trial court's denial of petitioner's objections.

This Honorable Court has recognized that a trial judge is required to give only instructions as to matters which are pertinent to the case at hand. *See Hopper v. Evans*, 456 U.S. 605 (1982); *Keeble v. United States*, 412 U.S. 205 (1973); and *Sansone v. United States*, 380 U.S. 343 (1965). In his brief, petition cites no authority to indicate that the lower courts' rulings on the claimed erroneous jury charges is inconsistent with *any* decision of this Court. Supervisory review again should be denied.

D. Petitioner's insanity claims:

Petitioner attempts to invoke the supervisory jurisdiction of this Honorable Court claiming his due process rights under the Fifth and Fourteenth Amendments were denied because the jury found him guilty as charged despite the evidence of insanity he presented at trial. *Pet.* at

ii., 22-27.

First, petitioner claims for the first time in the instant petition that the trial court and the Louisiana Third Circuit applied the wrong standard under La.C.Cr.P. art. 648, and that the statute is not unconstitutional in light of this Honorable Court's decision in *Cooper v. Oklahoma*, ___ U.S. ____, 116 S.Ct. 1373 (1996). *Pet.* at *ii.*, 22. However meritorious this argument may be, the simple fact remains that petitioner **has not presented this precise claim to the lower state courts.** Under La.C.Cr.P. arts. 924 and 930.8 (A), petitioner may present this claim in a state application for post-conviction relief, provided he meets the statutory requirements. Accordingly, this Honorable Court should decline to review petitioner's claim on the constitutionality of La.C.Cr.P. art. 648 as applied in his case given the fact that he has not presented that claim to state courts. *See Supreme Court Practice* at 90. Because this Honorable Court's supervisory jurisdiction is necessarily limited to final judgments of a state's highest court of last resort where a substantial federal question has been properly raised and necessarily decided upon, the context of petitioner's claimed unconstitutionality of La.C.Cr.P. art. 648 necessitates denial of review at this point. *See also State of Louisiana v. Frank*, 679 So. 2d 1365 (La. 1996)(on October 4, 1996, the Louisiana Supreme Court held that the clear and convincing evidence standard under La.C.Cr.P. art. 648 was unconstitutional in light of the *Cooper v. Oklahoma* decision.)

This Honorable Court has consistently deferred issues of federal law, in the first instance, to the state courts as a means to minimize federal intrusion into state affairs. *Supreme Court Practice* at 95. Furthermore, this Court has often recognized and insisted that state courts be allowed

the first opportunity to pass upon federal constitutional challenges to state action in the first instance, and that state courts, as their federal counterparts, are equally as competent in adjudicating federal constitutional claims. *See Allen v. McCurry*, 449 U.S. 90, 105 (1980)(confidence in state courts to adjudicate federal claims.) This Honorable Court has also adopted a policy of allowing state courts the opportunity to correct any possible constitutional violation caused by state action. *Picard v. Connor*, 404 U.S. 270, 277-278 (1971). The record in this matter, both from the trial court proceedings and the issues presented on appeal to the Louisiana Court of Appeal, Third Circuit, wherein the Louisiana Supreme Court denied petitioner's application for writ of certiorari, clearly does not include the claimed unconstitutionality of La.C.Cr.P. art. 648 as applied to the petitioner. Accordingly, petitioner has plainly failed to establish a basis for this Honorable Court's granting his petition for writ of certiorari on this issue.

Second, petitioner's main attack on the lower state court rulings regarding insanity centers upon his claim that the evidence at trial was not sufficient to support the jury's determination that petitioner was sane at the time he shots James L. Sharp. *Pet.* at *ii.*, and 22-27.

Despite petitioner's head injury and diagnosis of organic brain syndrome, the Third Circuit for the Louisiana Court of Appeal affirmed the trial court's ruling that petitioner was competent in that he could fully understand the consequences of the proceedings and he could assist in his defense. The Louisiana Third Circuit ruled that the final determination of petitioner's competency to stand trial is a decision for the trial court, and that such a determination of competency to proceed is entitled to great weight, and will not be disturbed on appeal unless petitioner established manifest error. *Id.*, 673 So. 2d at 1066.

On appeal petitioner claimed the trial court incorrectly denied his motions for new trial and for post verdict judgment of acquittal. *Id.*, 673 So. 2d at 1071. The Louisiana Third Circuit stated that in reviewing a motion for new trial, the trial judge must act as the thirteenth juror to review the weight of the evidence, and then determine whether he agreed with the jury's interpretation of the evidence. *See Id.*, 673 So. 2d at 1071-1072, citing *Tibbs v. Florida*, 457 U.S. 31 (1982). The Louisiana Third Circuit further held that on appeal, the trial judge's denial of a motion for new trial is reviewable only for an abuse of discretion. *Id.* The Louisiana Third Circuit also found that petitioner failed to present any evidence contesting the credibility of fact witnesses or law enforcement officials. *Id.* As far as petitioner's sanity at the time of the crime, the Louisiana Third Circuit ruled:

> We shall next consider whether the trial court abused its discretion by denying the motion for new trial as to ground number two, defendant's sanity at the time of the offense. The defense presented the testimony of five physicians, all of whom concluded that Campbell was incapable of distinguishing right from wrong at the time of the commission of the offense. Of these doctors, only Dr. Cole can be considered as having been Campbell's treating physician, having first treated him in 1986. The state, on the other hand, presented the testimony of four expert physicians who uniformly agreed that Campbell could distinguish right from wrong at the time of the commission of the offense. Clearly, therefore, the credible evidence and testimony conflicted on this issue.

The jury heard the opinions of nine experts, five for the defense and four for the state...When a defendant presents evidence establishing the defense of insanity at the time of the offense, the state is not required to offer evidence to rebut that presented by the defendant. Rather, the determination of whether defendant's evidence rebuts the sanity presumption is made by the trier of fact (in this case, the jury) viewing all of the evidence including expert and lay testimony, defendant's conduct, and his actions in committing the particular crime...As stated, in considering a motion for new trial, the trial judge, as the thirteenth juror, must apply these same rules to his evaluation of the evidence. *Id.*, 673 So. 2d at 1072-1073.

In reviewing petitioner's claim that his motion for post-verdict judgment of acquittal was erroneously denied, the Louisiana Third Circuit corrected ruled consistent with *Jackson v. Virginia*, 443 U.S. 307 (1979) that the unanimous verdict against petitioner was sufficient to maintain his conviction for second degree murder when the evidence, viewed in a light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proven beyond a reasonable doubt. *Id.*, 673 So. 2d at 1073.

In the instant matter, petitioner ignores the basic legal premise that the fact-finder's role is to weigh credibility of witnesses; the Louisiana Third Circuit was correct that "the appellate court should not second-guess the credibility determinations of the trier of fact beyond the sufficiency evaluations under the Jackson standard of review." *Id.* (Citations omitted.) The Court further noted

"The jury weighed the respective credibilities of the witnesses and the circumstances of the offense. It returned a unanimous verdict of guilty." *Id.*, 673 So. 2d at 1074.

The Louisiana Third Circuit's ruling is consistent with decisions of this Honorable Court. *See Anderson v. City of Bessember City, North Carolina*, 470 U.S. 564, 565 (1985)("clearly erroneous" standard does not entitle reviewing court to reverse findings by trier of fact simply because it would have decided the case differently; when findings rest on credibility of witnesses, even greater deference is given.) *See also Rushen v. Spain*, 464 U.S. 114, 121 (1983)(..."state courts' determination about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us.")

Review of petitioner's claims regarding his alleged insanity is not warranted.

CONCLUSION

Based upon the foregoing reasons, the State of Louisiana would respectfully request that this Honorable Court deny the instant petition for writ of certiorari to review the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995) and the Louisiana Court of Appeal, Third Circuit's decision in *State of Louisiana v. Terry Campbell*, 673 So. 2d 1061 (La. Ct. App. 3d Cir. 1996), *writ denied*, 685 So. 2d 140 (La.1997).

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General of Louisiana

KATHLEEN E. PETERSEN*
Assistant Attorney General

MARY ELLEN HUNLEY
Assistant Attorney General

APPENDIXES

LIST OF APPENDIXES

Appendix A Letter dated April 18, 1997, from Tim Screen, Director, Criminal Division, Louisiana Department of Justice, accepting appointment of District Attorney *Ad Hoc*

Appendix B Motion to Recuse from Thirteenth Judicial Attorney C. Brent Coreil, ordered effective April 16, 1997.

Appendix C Letter dated April 25, 1997, from Kathleen E. Petersen, Assistant Attorney General, notifying Louisiana Court of Appeal, Third Circuit, of the recusal.

Appendix D Letter dated May 23, 1997, from United States Supreme Court Clerk William K. Suter, requesting response by State of Louisiana be filed on or before June 23, 1997.

Appendix E Letter dated April 6, 1993, from Feliciana Forensic Facility officials notifying Honorable Preston N. Aucoin, Judge, Thirteenth Judicial District, of petitioner's competency to proceed.

Appendix F Judgement denying petitioner's Motions to suppress, signed December 6, 1993.

Appendix G Statement by Honorable Preston N. Aucoin, January 11, 1994.

Appendix H Applicable Louisiana statutes.

APPENDIX A

State Seal
Richard P. Ieyoub State of Louisiana
Attorney General Department of Justice
Criminal Division
Baton Rouge

P.O.Box 94095
Baton Rouge
LA.70804-9095
Telephone:
(504)342-7552
FAX:
(504)342-7893

April 18, 1997

P-97-04-564

Honorable Walter Lee
Clerk of Court, Evangeline Parish
P.O. Box 347
Ville Platte, Louisiana 70586

RE: State of Louisiana v. Terry Campbell

Dear Mr. Lee:

Pursuant to Article 680 et seq. Of the Louisiana Code of Criminal Procedure, Brent Coreil, District Attorney, 13th Judicial District, Parish of Evangeline, has been recused from any investigation or prosecution of the above captioned case and the case has been certified to me for appointment of a District Attorney Ad Hoc.

By virtue of the authority granted this office by Article 682 (as amended by Act 652 Regular Session 1972 Legislature), of the Code of Criminal Procedure, I hereby accept the

appointment of the court as District Attorney Ad Hoc in the above captioned matter. The Assistant Attorneys General assigned to the Criminal Division will function in the same manner as Assistant District Attorneys. This communication is your authority to enroll the Criminal Division of the Attorney General's Office as prosecutor of record in the captioned case. Kathleen Petersen, of my staff, will act as lead counsel in this case and will be your contact person with this office.

Additionally, please note that C.Cr.P. art. 683.1 authorizes reimbursement to the District Attorney Ad Hoc for the expenses incurred in the prosecution of recusal matters.

With kind personal regards, I am,

Sincerely,

RICHARD P. IEYOUB
ATTORNEY GENERAL

S/TIM SCREEN
TIM SCREEN
DIRECTOR,CRIMINAL DIVISION

cc: Hon.Preston N. Aucoin, District Judge
Hon. Brent Coreil, District Attorney

APPENDIX B

STATE OF LOUISIANA
VERSUS
TERRY CAMPBELL
CRIMINAL DOCKET NO. 45,690-F
13TH JUDICIAL DISTRICT COURT
EVANGELINE PARISH, LOUISIANA

****

MOTION TO RECUSE

TO THE HONORABLE, THE 13TH JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF EVANGELINE, STATE OF LOUISIANA:

NOW INTO COURT comes C. Brent Coreil, District Attorney in and for the Parish of Evangeline, State of Louisiana, through the undersigned, who with respect represents and informs the Court:

1.

That the office of the District Attorney, Parish of Evangeline, State of Louisiana, should be recused from the above captioned matter to avoid any appearance of impropriety.

2.

The Assistant District Attorney Raymond Lejeune, participated in providing a defense to **TERRY CAMPBELL** in the previous trial of this matter.

RESPECTFULLY SUBMITTED,
OFFICE OF THE DISTRICT ATTORNEY

BY: S/BRENT COREIL

C. BRENT COREIL
PARISH OF EVANGELINE
POST OFFICE DRAWER 780
VILLE PLATTE, LOUISIANA 70586
318-363-3438

ORDER

IT IS ORDERED that the District Attorney's Office for the Parish of Evangeline, State of Louisiana be recused from the above captioned matter and that the court hereby notifies the Attorney General of the State of Louisiana of this recusal in accordance with LSA - Code of Criminal Procedure Article 682.

Thus done at Ville Platte, Evangeline Parish, Louisiana, this 16th day of April, 1997.

S/PRESTON N. AUCOIN
PRESTON N. AUCOIN
DISTRICT JUDGE

APPENDIX C

State Seal
Richard P. Ieyoub State of Louisiana
Attorney General Department of Justice
Criminal Division
Baton Rouge

P.O.Box 94095
Baton Rouge
LA.70804-9095
Telephone:
(504)342-7552
FAX:
(504)342-7893

April 25, 1997

Honorable Kenneth deBlanc
Clerk, Louisiana Court of Appeal
Third Circuit
P.O. Box 3000
Lake Charles, LA. 70602

RE: *State of Louisiana v. Terry Campbell*
Docket No. Cr94-1140

ATTN: Roberta Burnett

Dear Mr. deBlanc:

Enclosed please find a true copy of the *Motion to Recuse* filed by the 13th Judicial District Attorney C. Brent Coreil in *State of Louisiana v. Terry Campbell*, Docket No. 45,690-F, Evangeline Parish. Please file the same into the appellate record filed under Docket No. CR94-1140 in your Court.

Also enclosed is a copy of the letter from Tim Screen, Director of the Louisiana Department of Justice, Criminal Division, appointing myself as the new prosecutor of

record. Defense counsel has filed a petition for certiorari in this matter with the United States Supreme Court.

If you have any questions, please do not hesitate to contact his office. With kind regards, I am

Sincerely,
S/Kathleen E. Petersen
Kathleen E. Petersen
Assistant Attorney General

cc/Dmitrc Burnes, Esq.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

William K. Suter **Area Code 202**
Clerk of the Court **479-3011**

May 23, 1997

Brent Coreil, Esquire
District Attorney
P.O. Box Drawer 780
Ville Platte, LA 70586

Re: 96-1584 - Campbell, Terry v. Louisiana
Dear Mr. Coreil:

Although you office has waived the right to file a response to the petition for a writ of certiorari in the above case, the court nevertheless has directed this office to request that a response be filed.

Forty printed copies of your response, together with the proof of service thereof, should be filed on or before June 23, 1997.

Your attention is directed to the provisions of Rule 33 of the rules of this Court. Please note that the color of the cover of your brief should be orange.

Sincerely,
S/William K. Suter
William K. Suter,Clerk

CC: Richard P. Ieyoub, Esquire
Kathleen E. Petersen, Esquire
Richard V. Burnes, Esquire

APPENDIX E

EXCERPTS FROM RECORD

State Seal STATE OF LOUISIANA LOUISIANA
Edwin W. Edwards Department of Health Seal
Governor and Hospitals
Office of Mental Health
Feliciana Forensic Facility

Date Stamped/Apr 12 1:03 PM'93

April 6, 1993

Honorable Preston N. Aucoin, Judge
Thirteenth Judicial District Court
Parish of Evangeline
Ville Platte, Louisiana 70586

RE: CAMPBELL, TERRY
HOSPITAL NUMBER: 02,454
DOCKET NUMBER: 45-690-F

Dear Judge Aucoin:

Mr. Terry Campbell was admitted to Feliciana Forensic Facility on March 1, 1993 as not competent to proceed relative to a charge of Second Degree Murder. We are preparing to discharge him from this institution to the custody of the Evangeline Parish Sheriff upon receipt of your Order returning him for the hearing statutorily required to be held within thirty (30) days from your receipt of this notice.

Pursuant to Article 649, Louisiana Code of Criminal Procedure, we are informing you that, after comprehensive evaluation and treatment, Mr. Campbell in our opinion now

understands the proceedings against him and can assist his attorney in the defense.

To assist you in your decision, we are enclosing our reports in a packet which details the treatment of Mr. Campbell while a patient at the Feliciana Forensic Facility. We are also enclosing two (2) proposed ORDERS for your review to expedite this return for the required hearing; one, re-appointing the original Sanity Commission and the other scheduling the hearing without the re-appointment of a Sanity Commission (if the State and defense decide to accept our report).

Please note that pursuant to recent amendments to Article 649, additional mental examinations by the original Sanity Commission may no longer be required if the defense counsel and prosecutor stipulate to submit the matter on the basis of the attached reports.

R.75-A
HIGHWAY 10 * P.O.BOX 888 * JACKSON,
LOUISIANA 70748
PHONE:504/634-2651 * FAX:504/634-7302
"AN EQUAL OPPORTUNITY EMPLOYER"

APPENDIX E

Letter to Judge Aucoin
RE: Terry Campbell
Page 2

Should our participation at the hearing be necessary, the psychiatrist you may wish to subpoena to testify in this case is Dr. Richard Gibson.

If we can be of further assistance, please contact us.

Sincerely,
S/K.Beth Harris, MSW
K. Beth Harris, MSW
L. Mental Health Social Worker

S/David K. Winstead, MD
Daniel K. Winstead, M.D.
Clinical Director

S/Jerry Westmoreland
Jerry D. Westmoreland
Chief Executive Officer

KBH/DKW/JDW/spjxc:(sic)Bill Pucheu, District Attorney
J. Michael Small, Defense Attorney
William Cloyd, M.D., Sanity Commission Member
Charles Fontenot,M.D.,Sanity Commission Member
Hugh Collins,Ph.D.,Supreme Court Judicial Administrator

APPENDIX F

STATE OF LOUISIANA
VERSUS
TERRY CAMPBELL
CRIMINAL DOCKET NO. 45,690-F
13TH JUDICIAL DISTRICT COURT
EVANGELINE PARISH, LOUISIANA

JUDGMENT

This case came for hearing on the "MOTION TO SUPPRESS INCLUPATORY STATEMENTS" and on the "SUPPLEMENTAL MOTION TO SUPPRESS" filed by defendant, **TERRY CAMPBELL**, which hearing was held on December 2, 1993.

APPEARANCES: Defendant, **TERRY CAMPBELL**, and his attorney's, J. Michael Small, Jesse Hearin and Raymond LeJeune,appearing for J.Jake Fontenot;

and

The State of Louisiana, represented by Richard W. Vidrine, Assistant District Attorney;

For the reasons orally assigned in open court, after the hearing of this case:

IT IS ORDERED, ADJUDGED AND DECREED that the "MOTION TO SUPPRESS INCULPATORY STATEMENTS" and the "SUPPLEMENTAL MOTION TO SUPPRESS" filed by defendant, **TERRY CAMPBELL,** be and the same are hereby denied.

APPENDIX F

JUDGMENT rendered on December 2, 1993.

JUDGMENT read and signed on this 6th day of December, 1993, at Ville Platte, Evangeline Parish, Louisiana.

S/PRESTON N. AUCOIN
PRESTON N. AUCOIN
DISTRICT JUDGE

R.175

APPENDIX G

FIRST TRIAL, JANUARY 11, 1994
R. 545 - 546
Trial Judge: Honorable Preston Aucoin

BY THE COURT:

That you have requested. All right bring in the jury. The jury has returned after argument has been made out of their presence. Now, Ladies and Gentlemen of the jury, listen very carefully to what I am going to tell you. At the request of the defense counsel, with no objection from the State, I am going to explain to you why this warrant was issued with the provisions and conditions that it was issued. It was because it was an unusual arrest. The circumstances that made it unusual were that Mr. Terry Campbell was at the Cypress Hospital when I signed the warrant for the arrest and it was a precautionary measure since he was being arrested at the hospital I did not want the police persons, or the law officers, to question him at all and that is why I had appointed an attorney to represent him. Do you all understand that? Now, I will also tell you that that is out of the ordinary. It is not usually done. Okay? Thank you.

BY MR. SMALL, Counsel for Defendant:

Thank you, Your Honor.

BY THE COURT:

Certainly. You may proceed.

APPENDIX H

LOUISIANA REVISED STATUES CITED

La.R.S.14:30.1 Second degree murder

A. Second degree murder is the killing of a human being:
(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. *Added by Acts 1973, No. 111, § 1. Amended by Acts 1975, No. 380, § 1; Acts 1976, No. 657, § 2; Acts 1977, No. 121, § 1; Acts 1978, No. 796, § 1; Acts 1979, No. 74, § 1, eff. June 29, 1979; Acts 1987, No. 465, § 1; Acts 1987, No. 653, § 1; Acts 1993, No. 496, § 1.*

La.R.S. 14:31 Manslaughter

A. Manslaughter is:
(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) or attempted perpetration of any felony not enumerated in article 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or
(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Article 30 or 30.1.

B. Whoever commits manslaughter shall be imprisoned at hard labor for not more than forty years. However, if the victim was killed as a result of receiving a battery and was under the age of ten years, the offender shall be imprisoned at hard labor, without benefit of probation or suspension of sentence, for not less than ten years not more than forty years. *Amended by Acts 1973, No. 127, § 1; Acts 1991, No. 864, § 1; Acts 1992, No. 306, § 1; Acts 1994, 3rd Ex.Sess., No. 115, § 1.*

La.R.S. 15:114 Parish of Orleans; rotation and selection of grand jury; control of grand jury

Each judge of the criminal district court for the Parish of Orleans shall in rotation, select the grand jury for the Parish of Orleans. The order of rotation among the judges in the selection of the grand jury prevailing at the time this Section goes into effect shall be preserved and continued. The judge of the section of the criminal district court who shall have appointed said grand jury shall have control and instruction over the grand jury, exclusive of all other judges of the criminal district court, and such grand jury shall make all findings and returns in open court to said judge;

and in addition thereto may make reports and requests in open court as provided by law; provided that if the judge to whom the control of the grand jury shall belong shall not be from any cause in the actual discharge of his duties as judge, the judges of the criminal district court then present shall designate some other judge to impanel and instruct said grand jury, or to receive its returns and findings, as the case may be, and the judge so designated shall continue to act for the judge to whom the control of such grand jury shall belong until said last-mentioned judge shall return to the discharge of duties; provided, further, that the grand jury in office at the time of the adoption of this Section shall, until the expiration of that term of office, be under the control of the presiding judge of the section by whom it was selected and shall return all indictments and findings to said judge in open court. *Acts 1966, No. 311, § 2, eff. Jan. 1, 1967.*

C.Cr.P. Art. 412 Drawing grand jury venire and subpoena of veniremen; Orleans Parish

A. In Orleans Parish, upon order of the court, the commission shall draw indiscriminately and by lot from the general venire box the names of seventy-five qualified persons, who shall constitute the grand jury venire.

B. The commission shall prepare and certify a list containing the names so drawn, and the list shall be delivered to the judge who ordered the drawing.

C. The court may direct the jury commission to prepare subpoenas directed to the persons on the grand jury venire, ordering their appearance in court on the date set by the court for the selection of the grand jury, and the jury commission shall then cause the subpoenas to be served in accordance with the provisions of Article

404.1(B) or R.S. 15:112, as directed by the court. *Amended by Acts 1968, No. 141, § 2; Acts 1985, No. 769, § 1; Acts 1987, No. 281, § 1.*

C.Cr.P. Article 413 Method of impaneling of grand jury; selection of foreman

A. The grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors, selected or drawn from the grand jury venire.

B. In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.

C. In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.

D. The first and second alternates shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415. *Amended by Acts 1990, No. 47, § 1.*

C.Cr.P. Article 414 Time for impaneling grand juries; period of service

A. A grand jury shall be impaneled twice a year in each parish, except in the parish of Cameron in which at least

one grand jury shall be impaneled each year.

B. In parishes other than Orleans, the court shall fix the time at which a grand jury shall be impaneled, but no grand jury shall be impaneled for more than eight months, nor less than four months, except in the parish of Cameron in which the grand jury may be impaneled for a year.

C. In Orleans Parish, a grand jury venire shall be drawn by the jury commission on the date set by the presiding judge. On the next legal day following the drawing, the jury commission shall submit the grand jury venire to the presiding judge, who shall impanel the grand jury. A grand jury in Orleans Parish shall be impaneled on the first Wednesday of March and September of each year.

D. A grand jury shall remain in office until a succeeding grand jury is impaneled. A court may not discharge a grand jury or any of its members before the time for the impaneling of a new grand jury, except for legal cause. *Amended by Acts 1985, No. 675, § 1.*

C.Cr.P. Article 436 The foreman; rules of procedure

The foreman of the grand jury shall preside over all hearings. He may delegate duties to other grand jurors and may determine rules of procedure. A grand juror who objects to a rule of procedure made by the foreman may apply to the court for a determination of the matter.

C.Cr.P. Article 648 Procedure after determination of mental capacity or incapacity

A. The criminal prosecution shall be resumed unless the court determines by clear and convincing evidence that the defendant does not have the mental capacity to proceed.

APPENDIX H

C.Cr.P. Article 924 Application for post conviction relief

An application for post conviction relief is a petition filed by a person in custody after sentence following conviction for the commission of an offense seeking to have the conviction and sentence set aside.

"Custody" as used in this Title means detention or confinement, or probation or parole supervision, after sentence following conviction for the commission of an offense. *Added by Acts 980, No. 249, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Article 930.8 Time limitations; exceptions; prejudicial delay

A. No application for post conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than three years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply:

(2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner established that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.

(3)

Supreme Court, U.S.
FILED
NOV 18 1997
CLERK

No. 96-1584

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY CAMPBELL,

Petitioner,

v.

LOUISIANA

Respondent.

On Writ of Certiorari
to the Supreme Court of Louisiana

JOINT APPENDIX

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Petition For Writ of Certiorari Filed April 4, 1997
Certiorari Granted September 29, 1997

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January 11, 1992 - Petitioner arrested.

February 3, 1992 - Grand jury selected.

February 4, 1992 - Grand jury handed down the indictment.

December 1, 1993 - Motion to Quash Grand Jury Indictment filed.

December 2, 1993 - Motion to Quash Grand Jury Indictment heard and denied.

December 6, 1993 - Judgment denying the Motion to Quash signed and filed.

December 6, 1993 - First trial began.

January 12, 1994 - First trial ended in mistrial.

May 9, 1994 - Re-trial began.

May 12, 1994 - Guilty verdict was returned.

May 20, 1994 - Motion for New Trial filed.

May 20, 1994 - Motion for New Trial heard and denied.

May 25, 1994 - Motion for Appeal filed.

November 7, 1994 - Petitioner's appeal brief filed.

March 1, 1995 - Court of Appeal, Third Circuit, ruled on appeal.

March 31, 1995 - State filed Application for Writ of Certiorari with the Supreme Court of Louisiana.

April 18, 1995 - Petitioner filed Opposition to Application for Writ.

October 2, 1995 - Supreme Court of Louisiana granted writ filed by the State.

November 3, 1995 - Supreme Court of Louisiana denied petitioner's Application for Rehearing.

January 31, 1996 - Petitioner filed first Petition for a Writ of Certiorari with the United States Supreme Court.

February 5, 1996 - Petitioner's writ placed on the docket of the United States Supreme Court.

March 13, 1996 - Court of Appeal, Third Circuit, denied remaining issues.

May 13, 1996 - United States Supreme Court denied first Petition for Writ of Certiorari.

June 7, 1996 - Court of Appeal, Third Circuit, denied application for rehearing.

July 8, 1996 - Petitioner filed Application for Writ with Supreme Court of Louisiana.

January 10, 1997 - Louisiana Supreme Court denied petitioner's Writ of Certiorari and/or Review

April 2, 1997 - Petitioner mailed Petition for a Writ of Certiorari to the United States Supreme Court.

April 4, 1997 - Petitioner for a Writ of Certiorari filed with the United States Supreme Court.

April 8, 1997 - Writ of Certiorari placed on the docket for the United States Supreme Court

September 29, 1997 - Order from United States Supreme Court granting certiorari limited to question one.

November 5, 1997 - Petitioner sends letter requesting an extension of time to file Brief on the Merits.

November 7, 1997 - Letter from United States Supreme Court granting extension to file Brief on the Merits.

November 13, 1997 - Brief on the Merits originally due with the United States Supreme Court.

November 19, 1997 - Brief on the Merits due after an extension was granted with the United States Supreme Court.

Filed 4/16/97
Tina C. Fontenot Dy. Clerk

STATE OF LOUISIANA	**CRIMINAL DOCKET NO. 45,690-F**
VERSUS	**13TH JUDICIAL DISTRICT COURT**
TERRY CAMPBELL	**EVANGELINE PARISH, LOUISIANA**

****

MOTION TO RECUSE

TO THE HONORABLE, THE 13th JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF EVANGELINE, STATE OF LOUISIANA:

NOW INTO COURT comes C. Brent Coreil, District Attorney in and for the Parish of Evangeline, State of Louisiana, through the undersigned, who with respect represents and informs the Court:

1.

That the office of the District Attorney, Parish of Evangeline, State of Louisiana, should be recused from the above captioned matter to avoid any appearance of impropriety.

2.

The Assistant District Attorney Raymond Lejeune, participated in providing a defense to **TERRY CAMPBELL** in the previous trial of this matter.

RESPECTFULLY SUBMITTED,
OFFICE OF THE DISTRICT ATTORNEY

BY: S/C. BRENT COREIL
PARISH OF EVANGELINE
POST OFFICE DRAWER 780
VILLE PLATTE, LOUISIANA 70586
318-363-3438

ORDER

IT IS ORDERED that the District Attorney's Office for the Parish of Evangeline, State of Louisiana be recused from the above captioned matter and that the court hereby notifies the Attorney General of the State of Louisiana of this recusal in accordance with LSA - Code of Criminal Procedure Article 682.

Thus done at Ville Platte, Evangeline Parish, Louisiana this 16th day of April, 1997.

S/PRESTON N. AUCOIN
PRESTON N. AUCOIN
DISTRICT JUDGE

(1)

Supreme Court, U.S.
FILED
NOV 18 1997
CLERK

No. 96-1584

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY CAMPBELL,

Petitioner,

v.

LOUISIANA

Respondent.

On Writ of Certiorari
to the Supreme Court of Louisiana

BRIEF ON THE MERITS FOR PETITIONER

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55pp

1.a. Whether a white criminal defendant has standing to object on equal protection grounds to the race-based exclusion of grand jury forepersons even if defendant is not of the same race as the excluded grand jury forepersons?

b. Whether a white criminal defendant has standing to raise the due process claim that the former and current forepersons of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution?

c. Whether a white criminal defendant has standing to raise the fair cross-section claim that the former and current forepersons of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

Terry Campbell is the Petitioner. He appears herein through retained counsel, Dmitrc I. Burnes and Richard V. Burnes, 711 Washington Street, Alexandria, Louisiana 71301-8030, (318) 448-0482.

Respondent is the State of Louisiana through Attorney General Richard P. Ieyoub, 301 Main Street, Sixth Floor, One American Place, Baton Rouge, Louisiana, 70801, (504) 342-7013, and/or District Attorney Brent Coreil, 200 Court Street, Ville Platte, Louisiana 70586, (318) 363-3438.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS, JUDGMENTS, AND ORDERS BELOW

The published opinion of the Supreme Court of Louisiana at issue in this case is cited as *State v. Campbell*, 95-0824 (La. 10/2/95); 661 So.2d 1321. The published denial of rehearing by the Supreme Court of Louisiana is cited as *State v. Campbell*, 95-0824 (La. 11/3/95); 661 So.2d 1374. (The published opinion by the Supreme Court of Louisiana on the issues appealed in state court for which this Court did not grant certiorari is cited as *State v. Campbell,* 96-1785 (La. 1/10/97); 685 So.2d 140.)

The published opinion of the Louisiana Court of Appeal, Third Circuit, on the issues in this case is cited as *State v. Campbell*, 94-1140 (La.App. 3 Cir. 3/1/95); 651 So.2d 412. The published opinion of the Louisiana Court of Appeal, Third Circuit, on the other issues is cited as *State v. Campbell,* 94-1140 (La.App. 3 Cir. 3/13/96); 673 So.2d 1061. The unpublished denial of rehearing by the Louisiana Court of Appeal, Third Circuit, is cited as *State v. Campbell,* 94-1140 (La.App. 3 Cir. 6/7/96).

The unpublished transcript of the denial of petitioner's *Motion for New Trial* in the Thirteenth Judicial District Court, Parish of Evangeline, Criminal Docket Number 45,690-F, is included in the record beginning at page 1226. The unpublished Judgment denying petitioner's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish of Evangeline, Criminal Docket Number 45,690-F, is included in the record beginning at page 176. The unpublished transcript of the hearing on petitioner's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish

of Evangeline, 45,690-F, is included in the record beginning at page 277.

STATEMENT OF JURISDICTION

28 U.S.C. § 1257 confers jurisdiction on this Court to review on writ of certiorari judgments of the Supreme Court of Louisiana.

The Supreme Court of Louisiana rendered judgments sought to be reviewed in this case on October 2, 1995, and on January 10, 1997. The Supreme Court of Louisiana denied petitioner's timely application for rehearing with respect to the October 2, 1995, judgment in an order dated November 3, 1995. Petitioner placed his *Petition for a Writ of Certiorari* in the United States Mail on April 2, 1997. Petitioner was notified in a letter dated April 9, 1997, from the Clerk of Court for the United States Supreme Court that the petition was filed on April 4, 1997, and placed on the docket on April 8, 1997.

Petitioner was notified by the Clerk of Court for the United States Supreme Court that an order granting certiorari (limited to question 1) had been entered on September 29, 1997. Said order directed petitioner to file his *Brief on the Merits for Petitioner* by November 13, 1997. Petitioner requested an extension of time pursuant to United States Supreme Court Rule 30 4 to file his *Brief on the Merits for Petitioner* in a letter dated and mailed on November 5, 1997, to the Clerk of Court for the United States Supreme Court. Petitioner was advised in a letter dated November 7, 1997, from the Clerk of Court for the United States Supreme Court that an extension of time was granted to file his *Brief on the Merits for Petitioner* until November 19, 1997.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

28 U.S.C. § 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Louisiana Code of Criminal Procedure, Article 413, provides:

> A. The grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors, selected or drawn from the grand jury venire.
>
> B. In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names to complete the

grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.

C. In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.

D. The first and second alternates shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415.

Louisiana Constitution of 1974, Article 1, § 2 provides:

> No person shall be deprived of life, liberty, or property, except by due process of law.

Louisiana Constitution of 1974, Article 1, § 15

> Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury. No person shall be twice placed in jeopardy for the same offense., except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.

STATEMENT OF THE CASE

The Supreme Court of Louisiana has decided important questions of federal law that have not been, but should be, settled by this Court. The decisions by the Supreme Court of Louisiana conflict with the relevant decisions of this Court in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), and in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Additionally, the decisions by the Supreme Court of Louisiana conflict with the decisions of the United States Court of Appeals, Eleventh Circuit, in *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), and in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984). Further, the United States Court of Appeals, Fifth Circuit, has entered a decision in *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983) which conflicts with the decisions of the United States Court of Appeals, Eleventh Circuit, in *Bowen* and *Sneed*.

I. Background

Petitioner, Terry Campbell, was arrested on January 11, 1992, and thereafter, an indictment alleging one count of second degree murder was returned against petitioner by a grand jury which was selected in an unconstitutional manner.

From the beginning, petitioner, Terry Campbell, a white man, has objected that the indictment charging him was constitutionally defective. Petitioner asserted that the grand jury foreperson selection process *as applied* in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clause and also violated petitioner's due process and fair cross-section rights. It is uncontested by the state and acknowledged by the trial

court that the prior thirty-five grand jury forepersons selected over a sixteen and one-half year period had all been white. On this issue, the very narrow question presented to this Court is whether a white criminal defendant has standing to raise equal protection, due process, and fair cross-section claims when blacks are systematically excluded from selection as grand jury forepersons.

The trial court denied petitioner's *Motion to Quash Grand Jury Indictment* holding that petitioner had no standing to raise race-based constitutional claims because petitioner is white. On appeal, the Louisiana Court of Appeal, Third Circuit, rendered a judgment overturning the trial court's ruling that petitioner had no standing to raise race-based constitutional claims. Without addressing petitioner's other claims on appeal, the Louisiana Court of Appeal remanded the case with instructions to have a hearing and make a determination whether the grand jury foreperson selection process in Evangeline Parish violated petitioner's constitutional rights. However, the Supreme Court of Louisiana granted the prosecution's application for writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit, holding that a white defendant had no standing to raise race-based constitutional claims. Petitioner then filed a *Petition for Writ of Certiorari* to this Court. The State of Louisiana, in its *Respondent's Brief in Opposition to Petition for Writ of Certiorari* argued primarily that petitioner's petition was premature. This Court denied petitioner's petition for writ on May 13, 1996, in docket number 95-1240, without comment whether the denial was on the merits or because the petition was premature.

The Louisiana Court of Appeal, Third Circuit, and

the Supreme Court of Louisiana have since ruled on petitioner's remaining issues on direct appeal and the case is now ripe for hearing by this Court.

II. Prior Rulings

A hearing was held on December 2, 1993, on petitioner's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court before the Honorable Preston M. Aucoin, District Judge. Said motion and hearing raised the issues of constitutional defects in the indictment relating to the grand jury foreperson selection process as applied in Evangeline Parish. Petitioner argued his equal protection claim, his due process claim, and his fair cross-section claim. The transcript of the hearing is included in the record beginning at page 277. In the judgment rendered on December 2, 1993, and signed on December 6, 1993, the trial court denied petitioner's motion to quash. The judgment is included in the record beginning at page 176. The trial court held that petitioner had no standing to raise race-based constitutional claims because petitioner is white. In ruling, the trial court stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant, Campbell. Again I am restricting all of my comments to this one particular case that we're here on this morning.
>
> This Court rules that the Defendant, Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant, Campbell, has no

> standing to raise that issue. That being the case the court need not consider other issues. The Motion to Quash the indictment is denied.

See the record at page 311.

Petitioner contemporaneously objected to the trial Judge's ruling. See the record at page 312.

Trial on the merits began on December 6, 1993, and ended in mistrial on January 12, 1994. Re-trial began on May 9, 1994. The jury returned a verdict of guilty of second degree murder against petitioner on May 12, 1994.

Prior to sentencing, petitioner timely filed a *Motion for New Trial* wherein petitioner again raised the issue of his indictment which was returned by an unconstitutionally selected grand jury. The *Motion for New Trial* is included in the record beginning at page 227. The motion was denied. The transcript of the denial of the *Motion for New Trial* is included in the record beginning at page 1226.

Petitioner, appealed his conviction to the Louisiana Court of Appeal, Third Circuit, and urged eleven assignments of error. The *Assignments of Error* filed by petitioner in his appeal is included in the record beginning at page 247. Assignment of error number one asserted that:

> [t]he trial court erred in overruling the Motion to Quash Grand Jury Indictment because Defendant was charged with a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected and that the grand jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States Constitutional Provisions.

In petitioner's brief and at oral argument, petitioner raised his equal protection, due process, and fair cross-section claims.

The State of Louisiana neither filed a brief in the appeal nor appeared for oral argument.

Without addressing the other errors raised by petitioner, the Louisiana Court of Appeal, Third Circuit, rendered a judgment dated March 1, 1995, overturning the trial court's ruling that petitioner had no standing to raise race-based constitutional claims because petitioner was white. *State v. Campbell,* 94-1140 p. 4 (La.App. 3 Cir. 3/1/95); 651 S.2d 412, 413-14. The Court of Appeal remanded the case to the Thirteenth Judicial District Court with instructions to have a hearing and make a determination whether the grand jury foreperson selection process in Evangeline Parish violated petitioner's constitutional rights. *State v. Campbell*, 94-1140 p. 4 (La.App. 3 Cir. 3/1/95); 651 So.2d 412, 413-14.

The state prepared and filed an *Application for Writ of Certiorari or Review to the Court of Appeal, Third Circuit* with the Supreme Court of Louisiana. Petitioner prepared and filed an *Opposition to Application for Writ of Certiorari or Review*. The Supreme Court of Louisiana granted the state's application for writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit. *State v. Campbell*, 95-0824 p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324. The Supreme Court of Louisiana held in its opinion that a white defendant had no standing to raise race-based constitutional claims:

> Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury

> foremen as he is not one of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that if discrimination in the appointment of an individual to that post significantly invades the distinctive interest of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. . . . Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

State v. Campbell, 95-0824 p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324.

At this point, petitioner was faced with a dilemma. Because the Louisiana Court of Appeal, Third Circuit, and subsequently the Supreme Court of Louisiana had only ruled on one issue, it was unclear whether that one issue would then be ripe for review by the United States Supreme Court. Out of an abundance of caution, petitioner prepared and filed a *Petition for a Writ of Certiorari* with this Court raising the issue of the grand jury foreperson selection process. The State of Louisiana, through the office of the Attorney General, filed a *Respondent's Brief in Opposition to Petition for Writ of Certiorari* arguing primarily that petitioner's petition for writ was premature based on *Flynt v. Ohio,* 451 U.S. 619, 101 S.Ct. 1958, 68

L.Ed.2d 489, (1981) and *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 328, (1975). This Court denied petitioner's petition on May 13, 1996, in docket number 95-1240, without comment as to whether the denial was on the merits or because the petition was premature. *Campbell v. Louisiana*, ___ U.S. ___, 116 S.Ct. 1673 (1996).

On March 13, 1996, the Louisiana Court of Appeal, Third Circuit, ruled on petitioner's remaining issues on appeal. *State v. Campbell*, 94-1140 (La.App. 3 Cir. 3/13/96). The Louisiana Court of Appeal, Third Circuit, denied petitioner's *Application for Rehearing* on June 7, 1996. *State v. Campbell*, 94-1140 (La.App. 3 Cir. 6/7/96).

The Supreme Court of Louisiana, in a decision dated January 10, 1997, denied petitioner's *Application for Writ of Certiorari or Review. State v. Campbell*, 96-1785 (La. 1/10/97); 685 So.2d 140.

Petitioner has exhausted state remedies and the case is now ripe for consideration by this Court.

Petitioner has raised the issue of discrimination in the grand jury foreperson selection process at all stages starting with a pre-trial *Motion to Quash Grand Jury Indictment*, and by raising the issue in a timely *Motion for New Trial*, and by urging an assignment of error in his direct appeal to the Louisiana Court of Appeal, Third Circuit, and in his reply to the state's application for writ to the Supreme Court of Louisiana. Petitioner has at all times preserved this issue.

SUMMARY OF ARGUMENT

Petitioner, Terry Campbell, was indicted by a grand jury in Evangeline Parish, Louisiana, where historically, the grand jury forepersons had been selected in a discriminatory manner. Petitioner presented proof showing that for a sixteen and one-half year period up to the time of his indictment, all of the grand jury forepersons have been white. Neither the trial court, nor the prosecutor, disputed petitioner's evidence. Based upon the racial discrimination in the selection of grand jury forepersons, petitioner moved to quash the grand jury indictment raising equal protection claims, due process claims, and fair cross-section claims that rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under Article 1, §§ 2 and 15 of the Louisiana Constitution of 1974 had been violated.

It is well established law that criminal defendants have standing to challenge racial discrimination in the selection of both petit and grand jury members regardless of the race of the criminal defendant. Likewise, there is no question that a criminal defendant can challenge racial discrimination in the selection of grand jury forepersons when the criminal defendant is of the same class as those excluded from service.

This Court has also made it clear in its analysis in equal protection cases involving both grand and petit juries that the race of the criminal defendant raising the challenges is irrelevant.

In rulings at the trial court level and in the Supreme Court of Louisiana, petitioner has been denied standing to raise equal protection, due process, and fair cross-section

claims that blacks were excluded from selection as grand jury forepersons based on the fact that petitioner is white.

Although this Court has not addressed the precise question of whether a white criminal defendant can raise such claims in the context of the grand jury foreperson, the other holdings by this Court consistently uphold the right of a criminal defendant to raise such claims regardless of his race.

This Court should rule that petitioner not only has standing to raise his constitutional claims, but in view of the acknowledged proof in the case should order that the indictment be quashed and remand the case for further proceedings.

ARGUMENT

A. The Issue: 1) History of Racial Discrimination in the Selection of Grand Jury Forepersons in Evangeline Parish

For a period from January of 1976 through August of 1993, thirty-five grand jury forepersons had been selected in Evangeline Parish where approximately twenty-three percent of the registered voters were black. All thirty-five grand jury forepersons were white; none were black. Petitioner's evidence covered a sixteen and a half year period. In *Guice v. Fortenberry*, 722 F.2d 276, 280 (5th Cir. 1984), and *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991), cases involving similar claims (but involving black criminal defendants), the periods of time that the United States Court of Appeals, Fifth Circuit, found relevant were fifteen and twenty years, respectively.

2) Constitutional Claims Raised by Petitioner

Petitioner, prior to the trial on the merits in his case, filed a *Motion to Quash Grand Jury Indictment* wherein he objected that the indictment against him was constitutionally defective in that the manner of selection of grand jury forepersons was illegal and unconstitutional. More specifically, petitioner asserted that the grand jury foreperson selection process *as applied* in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clauses of both the United States Constitution and the Louisiana Constitution. Additionally, petitioner argued that the grand jury foreperson selection process violated his due process and fair cross-section rights guaranteed by the United States Constitution and the Louisiana Constitution.

B. The Law: Established Law on Issues of Discrimination in Jury Selection

It is well established law that a criminal defendant can challenge the race-based exclusion of petit jurors. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

> For over fourscore years it has been federal statutory law, 18 Stat. 336 (1875), 18 U.S.C. § 243, and the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); see also *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939).
>
> *Whitus v. State of Georgia*, 385 U.S. 548, 549-50, 87 S.Ct. 643, 646, 17 L.Ed.2d 599 (1967).

In such a context, it has also been held that the criminal defendant making the challenge need not be of the same race (*Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972)) or gender (*Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)).

Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), also instructs that a white defendant has standing to challenge his conviction where blacks are systematically excluded from the grand jury.

This Court held that a criminal defendant has standing to object to race based exclusion of jurors on equal protection grounds under *Batson v. Kentucky*, 476

U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), even if he is not of the same race as the challenged jurors. *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The essence of an equal protection challenge is that defendant is asserting the rights of the excluded jurors.

And, this Court explained in *Rose v. Mitchell,* that a black criminal defendant may challenge his conviction when the discrimination extends only to the grand jury foreperson.

In a context of grand juries, it is clear that a black criminal defendant has standing to object to race based exclusion of blacks from the grand jury.

Although earlier jurisprudence was less than clear on the issue, the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), clarified that a criminal defendant does have standing to bring an equal protection claim where the issue raised is the rights of others excluded from participation in the judicial process. *Powers* held that, in the context of peremptory challenges of petit jurors, under the equal protection clause, a criminal defendant has standing to objection to race-based exclusions whether or not the defendant and those excluded share the same race.

In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), this Court held that a non-black criminal defendant has standing to challenge the system when there was a systemic exclusion of blacks from the grand jury that indicted him and the petit jury that convicted him.

The United States Supreme Court initially set out a

three step test to determine whether a defendant establishes a *prima facie* case of discrimination in an equal protection claim in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), a case involving Mexican-American criminal defendants objecting to the exclusion of Mexican-Americans from the grand jury. And in *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the United States Supreme Court applied the three step process for establishing a *prima facie* case of discrimination in the context of grand jury foreperson selection:

> That is, "in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda v. Partida*, 430 U.S., at 494, 97 S.Ct., at 1280. Specifically, respondents were required to prove their prima facie case with regard to the foreman as follows:
>
> "The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreman], over a significant period of time. . . . This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral

> supports the presumption of discrimination raised by the statistical showing." *Ibid.*
>
> Only if respondents established a prima facie case of discrimination in the selection of the foreman in accord with this approach, did the burden shift to the State to rebut that prima facie case. *Id.*, at 495, 97 S.Ct., at 1280.

Rose v. Mitchell, 443 U.S. at 565, 99 S.Ct. at 3005.

In *Rose*, the United States Supreme Court noted that discrimination in the selection of the grand jury requires reversal of a state conviction. In fact,

> where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, [this Court] uniformly has required that the conviction be set aside, and the indictment returned by the unconstitutionally constituted grand jury be quashed.

Rose v. Mitchell, 443 U.S. at 551, 99 S.Ct. at 2998 (citations omitted).

The United States Court of Appeal, Fifth Circuit, has adopted the position (in the context of black criminal defendants and discrimination in selection of the grand jury foreperson) that

> such discrimination compels voiding the indictments and convictions. "If convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination affected the foreman."

Guice v. Fortenberry, 722 F.2d 276, 282 (5th Cir. 1984). (citations omitted.)

C. The Facts: 1) Proof of Racial Discrimination in the Selection of Grand Jury Forepersons in Evangeline Parish

At the hearing held on December 2, 1993, petitioner introduced evidence establishing the proportions of blacks in Evangeline Parish for the prior sixteen and one-half year period. Petitioner's population statistics were taken from the registered voter lists of Evangeline Parish for 1976 through 1993. Petitioner's data is summarized as follows:

Date	Total	White	Black	Blacks as a % of Total
3/31/76	20,059	15,749	4,310	21.49
3/31/77	20,309	15,958	4,351	21.42
3/31/78	19,671	15,455	4,216	21.43
3/31/79	20,097	15,732	4,365	21.72
3/31/80	21,818	17,093	4,725	21.66
3/31/81	21,592	16,907	4,685	21.70
3/31/82	20,938	16,347	4,591	21.93
3/31/83	21,499	16,722	4,777	22.22
3/31/84	22,266	17,139	5,124	23.01
3/31/85	21,446	16,391	5,048	23.54
3/31/86	21,123	16,120	5,003	23.69
3/31/87	21,726	16,501	5,220	24.03
3/24/88	21,542	16,287	5,251	24.38
4/01/89	21,192	15,882	5,300	25.01
3/09/90	21,274	15,888	5,376	25.27
2/15/91	21,963	16,469	5,480	24.95
3/31/92	21,817	16,270	5,532	25.54
2/12/93	21,920	16,390	5,511	25.51

Petitioner established that during the period, no black person had ever been selected as a grand jury

foreperson. See record at pages 103-71.

It was uncontested at the December 2, 1993, hearing and in all subsequent proceedings that the prior thirty-five grand jury forepersons over a sixteen and one-half year period had all been white. **This fact was admitted not only by the state but also acknowledged by the trial judge**:

> BY THE COURT:
>
> I've asked you this question and I - there's one that you haven't satisfactorily answered. What kind of evidentiary hearing would we have. The District Attorney has already agreed that all of your figures, and your statistics, and your things that you appended to your motion are correct. So, what would you want? You would want him to bring the other judges, that we hear all these judges that are still alive and ask them how they pick juries. I tell you what they would say. They would say that they selected the foreman. That's what they would tell you.
>
> BY MR. HEARN, Counsel for Defendant:
>
> That's true. But, the D.A. would have the opportunity to show that that despite the numbers they came up by chance. It is conceivable possible.
>
> BY THE COURT:
>
> But not when you say they are all white. I mean, I don't think there is anybody in this courtroom that disputes the fact that there has never been a black grand jury foreperson in this parish. So, what kind of evidence would Mr. Vidrine put on?

See record at page 303.

The fact that zero grand jury foremen were black is compelling. "While 'statistics are not, of course, the whole answer, . . . nothing is as emphatic as zero.'" *Johnson v. Puckett*, 929 F.2d 1067, 1073 (5th Cir. 1991)(quoting *Guice v. Fortenberry*, 661 F.2d 496, 505 (5th cir. 1981)(en banc), quoting *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969)). The chances of randomly picking a white person thirty-five consecutive times given the population distribution of Evangeline Parish is less than one in ten thousand.

2) Louisiana Courts Denied Petitioner Standing to Raise Constitutional Claims

Despite the acknowledged *de facto* history of discrimination in the selection of grand jury forepersons, petitioner was denied standing to challenge the indictment by the trial court:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant, Campbell. Again I am restricting all of my comments to this one particular case that we're here on this morning.
>
> This Court rules that the Defendant, Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant, Campbell, has no standing to raise that issue. That being the case the court need not consider other issues. The Motion to

Quash the indictment is denied.
See the record at page 311.

Ultimately, the Supreme Court of Louisiana concurred in the denial of standing to petitioner to challenge the indictment:

> Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not one of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that if discrimination in the appointment of an individual to that post significantly invades the distinctive interest of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. . . . Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

State v. Campbell, 95-0824 p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324.

Although petitioner has consistently raised equal protection claims, due process claims, and fair cross-section claims, the Louisiana courts have generally ignored and failed to specifically rule the fair cross-section issue. The

Louisiana courts have made their rulings using equal protection and due process language.

D. Why This Court Should Act

This case involves constitutional issues of substantial importance to criminal jurisprudence which this Court has not addressed and which the Supreme Court of Louisiana has decided in a way that conflicts with relevant decisions of this Court.

Further, the decision by the Supreme Court of Louisiana directly conflicts with the decisions entered by the United States Court of Appeals, Eleventh Circuit. And finally, there is a split in the circuits on this issue. The United States Court of Appeals, Fifth Circuit, has entered a decision which directly conflicts with the decisions entered by the Eleventh Circuit.

Due Process

A reading of the transcript of the argument at the December 2, 1993, hearing and of the trial court's ruling shows that the trial court improperly relied upon the federal case of *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), in reaching its holding that petitioner had no standing to raise his constitutional claims.

The Supreme Court of Louisiana ruled that, under *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), a white defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury forepersons because the role of the grand jury foreperson in Louisiana is ministerial. *State v. Campbell*, 95-0824, p. 4-5

(La. 10/2/95); 661 So.2d 1321, 1324.

That holding by the Supreme Court of Louisiana misapplies the holding and reasoning of *Hobby*. The United States Supreme Court distinguished the case of *Rose v. Mitchell*, stating that:

> Moreover, *Rose* must be read in light of the method used in Tennessee to select a grand jury and its foreman. Under that system, 12 members of the grand jury were selected at random by the jury commissioners from a list of qualified potential jurors. The foreman, however, was separately appointed by a judge from the general eligible population at large. The foreman then served as "'the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members there-of.'" *Rose v. Mitchell, supra*, at 548, n. 2, 99 S.Ct., at 2996, n. 2 (quoting Tenn. Code Ann. § 40-1506 (Supp.1978)). The foreman selection process in *Rose* therefore determined not only who would serve as presiding officer, but also who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion. Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed.Rule Crim.Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. **So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process.**

Hobby v. United States, 468 U.S. at 347-48, 104 S.Ct. at 3098. (Emphasis added.)

In *Hobby*, the federal grand jury foreperson is selected from a properly constituted grand jury. The selection process in Evangeline Parish is similar to that used *Rose*. Pursuant to Louisiana Code of Criminal Procedure, Article 413:

> the grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors selected or drawn from the grand jury venire. In parishes other than Orleans, *the Court shall select one person from the grand jury venire to serve as foreman of the grand jury*. The Sheriff shall draw indiscriminately by lot from the envelope containing the remaining names of the grand jury venire a sufficient number of names to complete the grand jury. (Emphasis added.)

As in *Rose*, the Louisiana trial court selects one voting member of the grand jury. And the discrimination in the selection of the foreperson distorts the composition of the resulting grand jury thereby tainting the whole.

Therefore, the reliance by the Supreme Court of Louisiana on *Hobby* is inappropriate in light of the above distinction drawn by the United States Supreme Court between *Hobby* and *Rose*.

Equal Protection

The Supreme Court of Louisiana further ruled that a

defendant does not have standing to bring an equal protection claim challenging exclusion of blacks from serving as grand jury foremen when the defendant is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. *State v. Campbell*, 95-0824, p. 4 (La. 10/2/95); 661 So.2d 1321, 1324. The United States Supreme Court has not ruled on the precise question of whether a white defendant has standing to object on equal protection grounds to the exclusion of blacks as grand jury forepersons.

The decision by the Supreme Court of Louisiana that a white defendant has no standing to raise the equal protection claim that blacks were excluded from selection as grand jury forepersons is also in conflict with decisions by the United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984), *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), *United States v. Holman*, 680 F.2d 1340, (11th Cir. 1982), and *United States v. Perez-Hernandez*, 672 F.2d 1380, (11th Cir. 1982) (per curiam). The United States Court of Appeals, Eleventh Circuit, has steadfastly ruled that the fact that the defendant is not a member of the underrepresented group does not deprive him of standing to bring a claim of denial of equal protection and exclusion of other groups from serving as grand jury forepersons even though he was not of that race (or gender).

The decisions by the United States Court of Appeals, Eleventh Circuit, conflict with the decision entered by the United States Court of Appeals, Fifth Circuit, in *United States v. Cronn*, 717 F.2d 164 (1983). There, the Fifth Circuit, held that "equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the

judicial process as it is applied to him." *United States v. Cronn*, 717 F.2d at 169.

The first step of the *Castaneda* test is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or as applied. *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. The confusion on the issue of standing in the state's argument and the trial court's ruling arises from its misidentification of the term "group." The state contends that "group" includes the petitioner. The ruling by the Supreme Court of Louisiana is also based in part on this same misidentification. In many of the early equal protection cases such as *Castaneda v. Partida* and *Rose v. Mitchell*, often the defendant was a member of the same minority group that was being excluded in some manner. In *Castaneda v. Partida*, the excluded group and the defendant were Mexican-American; in *Rose v. Mitchell* the excluded group and the defendant were black. The Authors of those opinions, therefore, had no reason to draw a distinction between the race of the criminal defendant and the race of the excluded class. But as *Powers* points out, the essence of this type of third party claim is that the rights of the excluded class are being raised by the criminal defendant. When analyzed properly, the "group" referred to is that of the excluded class, in this case blacks excluded as grand jury forepersons in Evangeline Parish. The United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (1984), had no problem in recognizing that the defendant need not be a member of the underrepresented or excluded group when raising an equal protection claim of discrimination in the selection process of grand jury forepersons.

The group excluded from selection as grand jury

forepersons is blacks. This is a group that is "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. As the United States Court of Appeals, Fifth Circuit, has already noted, "[b]lacks compromise a distinct class capable of being singled out for different treatment under the laws." *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991). Indeed, in *James v. Whitley*, 39 F.3d 607, 609 (5th Cir. 1994), a case involving issues similar to the case *sub judice*, the state conceded that the petitioner had established that blacks are a recognizable distinct class that receives different treatment under the laws as written or applied.

In its analysis in *Powers*, this Court noted that the discriminatory use of preemptory challenges causes the defendant cognizable injury and he has a concrete interest in challenging the practice because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. Second, the relationship between the defendant and excluded jurors is such that the defendant is fully as effective a proponent of their rights as they themselves would be since both have a common interest in eliminating racial discrimination from the courtroom and there can be no doubt that the defendant will be a motivated, effective advocate because proof of a jury selected in a discriminatory manner may lead to the reversal of the conviction under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Third, it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his own rights. Thus, the fact that a criminal defendant's race differs from that of the excluded jurors is irrelevant to his standing to object to the discriminatory use

of preemptorys.

Identical logic applies to the petitioner's equal protection claim of discrimination in selection of grand jury forepersons. First, the petitioner here is caused a cognizable injury when discrimination in selection of grand jury forepersons casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. The petitioner here has the concrete interest in challenging such a practice. Secondly, the relationship between this petitioner and those excluded from selection as grand jury forepersons in Evangeline Parish is identical to the relationship between the defendant in *Powers* and the excluded petit jurors. Both Campbell and Powers would be effective proponents of the rights of the excluded members and both would have a common interest in eliminating racial discrimination in the courtroom. And finally, it is equally as unlikely in the context of the grand jury foreperson selection process in Evangeline Parish that a minority excluded from selection as a grand jury foreperson would be likely to posses sufficient incentive to set in motion a suit to vindicate his rights.

Therefore, as in *Powers*, the fact that petitioner's race differs from that of the excluded members is <u>irrelevant</u> to the analysis of his standing to object to the discriminatory practice in question.

Fair Cross-Section

Petitioner also has standing to raise his fair cross-section claims. Petitioner's race is irrelevant in deciding whether the composition of the grand jury met the Sixth Amendment's fair cross-section requirements when one member of the grand jury (the foreperson) was selected in a

discriminatory manner.

Petitioner has raised and continues to raise the issue of violation of the rights guaranteed to him under the United States Constitution and Louisiana Constitution and the fair cross-section clause of the Sixth Amendment. It is, of course, obvious that if all twelve members of the grand jury are chosen in a discriminatory manner a defendant's rights to a fair cross-section are violated. But what if only eleven are chosen in that way? What if only half or one-fourth? What if one member, the foreperson, is always chosen based on race? Discrimination is impermissible even in that case. Petitioner asserts that by selecting a grand jury foreperson in a discriminatory fashion, the entire grand jury was tainted as a result. *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981)(en banc), echoed the proposition that "[i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination effected only the foreman." *Guice v. Fortenberry*, 661 F.2d at 499.

Petitioner's races is in no way relevant to his standing to raise any of his claims. A grand jury chosen in a discriminatory manner can not be said to be unqualified to indict a black man but qualified to indict a white man.

E. The Remedy: 1) Petitioner Should Be Granted Standing to Challenge Racial Discrimination in the Selection of Grand Jury Forepersons

Petitioner has been denied the opportunity to raise constitutional challenges on equal protection grounds, due process grounds, and fair cross-section grounds to the grand jury foreperson selection process solely because he was not of the same race as those excluded from selection. This

Court has uniformly ruled in other cases which differ only slightly that a criminal defendant's race is not relevant in making such claims. In this case, the Court has the opportunity to put to rest the issue that, regardless of whether it is in the context of a petit jury, a grand jury, or only in the selection of a grand jury foreperson, the race of one who would challenge discrimination is irrelevant. To rule otherwise would be to make a sole exception in the context of selection of grand jury forepersons. Further, and more importantly, to rule that petitioner does not have standing to raise such issues would be to open the questions of exactly which kind of criminal defendants can object to which kinds of discrimination in the selection of grand jury forepersons. Could an African-American object that Mexican-Americans are being discriminated against? Could Mexican-Americans object that whites were being discriminated against? Also, the question would arise whether a given grand jury in which the foreperson was chosen in a discriminatory matter would be qualified to indict two co-defendants, one of which was white and one of which was black. Would any grand jury be qualified to indict a person of mixed race?

The legal theory behind an equal protection claim is that a criminal defendant is raising the rights of <u>others</u> excluded from the system. The race of the defendant making such a claim is not germane to the validity of such a claim. Similarly, any criminal defendant is harmed when the grand jury is composed in a discriminatory fashion. Whether the selection of the grand jury foreman is analyzed under due process or under a fair cross-section claim, it is not right to say that racial discrimination is permitted for some defendants and not for others.

2) Racial Discrimination in the Selection of Grand Jury Forepersons Requires That the Indictment Be Quashed

(This section is taken almost verbatim from the Magistrate Judge Noland's Report in the case of *Rideau v. Whitley,* Civil Action No. 94-952-B-M2, United States District Court, Middle District of Louisiana. There, Magistrate Christine Noland prepared a exhaustive study of the history of this Court's rulings on the issue of racial discrimination in the determination of who serves on the grand jury.)

More than 20 times in the last century, the United States Supreme Court has sent a message to state court systems: The 14th Amendment requires that states use racially neutral methods of selecting grand jurors. A state may not exclude African-Americans from its grand juries. To the contrary, a state may not use race or ethnic background in any way to determine who shall serve on a grand jury. A state that chooses to do so, the Supreme Court has said, risks a reversal of the conviction, even if that requires re-indicting and retrying the defendant many years after the crime.

The first Supreme Court pronouncement on this issue came only 15 years after the end of the Civil War, which had given birth to the 14th and 15th Amendments. In *Strauder v. West Virginia,* 100 U.S. 303, 25 L.Ed. 665 (1880), the court reversed and remanded a state-court conviction because African-American citizens were excluded from the grand jury that returned the indictment against the defendant. The court said that exclusion

of this kind violates the Equal Protection Clause of the 14th Amendment.

Only a year later, the court repeated this holding in *Neal v. Delaware,* 103 U.S. 370, 26 L.Ed. 567 (1881). In *Neal,* a black defendant was charged with rape. The grand jury that indicted him, and the petit jury that convicted him, were all-white. The State argued that, while its law excluded black citizens from grand jury service, the law had not been enforced in many years and thus the State was not practicing racial discrimination. The Supreme Court thought otherwise:

> The right secured to the colored man under the Fourteenth Amendment and the civil rights laws, is that he shall not be discriminated against solely on account of his race or color, and it follows that no state law can for that cause alone exclude him from the jury box, nor can a state officer be permitted in the performance of his official duties, to purposely keep the colored man off the jury lists.
>
> * * *
>
> [W]hile a colored citizen, party to a trial involving his life, liberty or property, cannot claim as a matter of right, that his race shall have a representative on the jury, and while a mixed jury in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it *is* a right to which he is entitled, that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no

> discrimination against them, because of their color.

Neal, 26 L.Ed. at 572-573, emphasis in original.

If the Supreme Court believed these cases would cause the states to get the message, it was mistaken. A parade of similar cases came before the court over the next 50 years. ***Bush v. Kentucky,*** 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883) (murder conviction reversed and remanded for exclusion of blacks from grand jury); ***Carter v. Texas,*** 117 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839 (1900) (murder conviction reversed and remanded when defendant not given opportunity to challenge exclusion of blacks from grand jury); ***Rogers v. Alabama,*** 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1904) (same); ***Hollins v. Oklahoma,*** 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500 (1935) (per curiam); ***Norris v. Alabama,*** 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1904); ***Hale v. Kentucky,*** 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050 (1938) (per curiam, citing affidavit evidence of systematic lack of blacks on grand juries).

In ***Pierre v. Louisiana,*** 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939), the Supreme Court for the first time analyzed a Louisiana parish's practices of drawing a grand jury venire. The defendant was black and was charged with murder. He presented sworn evidence that the population of the parish where he was charged was at least one-third black. Despite this, his grand jury venire contained the names of no black citizens. The state presented nothing to rebut this evidence. The Supreme Court found that the defendant's evidence

was sufficient to demonstrate racial discrimination in the selection of both the grand jury and the petit jury.

Only three years later, the Supreme Court for the first time had to determine how to evaluate testimony from local officials that they did not discriminate on the basis of race. In ***Hill v. Texas,*** 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942), the defendant claimed that blacks in the county where he was indicted were systematically excluded from grand jury service. The defendant presented evidence that of the 66,000 county residents who paid the poll tax and thus were qualified to sit as grand jurors, about 8,000 were black. Despite this, there were no blacks on the grand jury list.

The State introduced evidence from county officials who testified that they had no prejudice against naming blacks to the grand jury, but they did not know of any qualified blacks. The county's assistant district attorney testified that he had no memory of any blacks being named to the county's grand juries.

The Supreme Court reversed and remanded. In doing so, the Court again reminded the states of their responsibility under the 14th Amendment, despite any feelings their citizens may have toward an accused person:

> Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is

> that its safeguards extend to all - the least deserving as well as the most virtuous.

Hill, 316 U.S. at 406, 62 S.Ct. at 1162.

In *Patton v. Mississippi,* 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 839 (1950), the court considered a ruling from the state court that the lack of a black person on the state's grand juries for more than 30 years was irrelevant in determining whether racial discrimination was practiced. The Supreme Court responded to this position first by disagreeing and then by determining that the state court's use of such reasoning detracted from the weight and respect the Supreme Court would otherwise give the state court's conclusions. Again, the Supreme Court reversed the state court and remanded the case.

That same year, the court ruled that it is insufficient for jury commissioners to shrug their shoulders and proclaim they know of no qualified blacks. The court held that the jury commissioners have a duty to acquaint themselves with qualified black citizens. *Cassell v. Texas,* 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950). Thus, the court said, jury commissioners may not simply choose people they know. See also *Eubanks v. Louisiana,* 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958), in which the court was faced with testimony from public officials that, although blacks were under-represented on grand juries, it was not because they intentionally discriminated. The officials testified they were just trying to pick the best grand jurors. The court rejected this evidence and remanded the case.

Discrimination may be proved in other ways

> than by evidence of long continued unexplained absence of Negroes from many panels. The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area where Negroes make up so large a proportion of the population prove the intentional exclusion that is discrimination in violation of petitioners constitutional rights.

Cassell, 339 U.S. at 290, 70 S.Ct. at 633.

. . . Cassell argued that a pattern emerged in which only one black was assigned to each grand jury, apparently as part of a plan to do so. The Supreme Court agreed and issued a warning to the states that such "token" assignments would not do.

> The contention is that the Akins case has been interpreted in Dallas County to allow a limitation of the number of Negroes on each grand jury, provided the limitation is approximately proportional to the number of Negroes eligible for grand-jury service ... If ... commissioners should limit proportionally the number of Negroes selected for grand jury service, such limitations would violate our Constitution.

Cassell, 339 U.S. at 286, 70 S.Ct. At 631.

Five years later, the Supreme Court discussed the consequences of maintaining a jury selection system in which the selection panel knows the race of the potential jurors. *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1955). The court concluded that a system in which petit

jury venires were selected from cards that featured the race of the potential jurors, when coupled with evidence that blacks were excluded from service, violated the 14th Amendment. Such a system, the court said, "makes it easier for those to discriminate who are of a mind to discriminate." [345 U.S. at 562, 73 S.Ct. at 892.]

Identical results occurred in *Whitus v. Georgia,* 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967) and *Jones v. Georgia,* 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967), where county officials selected grand jurors based on public records that identified the candidates by race. This, coupled with evidence that only a minute number of blacks were selected for grand jury service led the court to conclude that the defendant had proven a prima facie case of racial discrimination. Thus, it became the State's burden to provide evidence to rebut this case. Because the State failed to do so, the convictions were reversed, and the cases were remanded. See also *Sims v. Georgia,* 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967), a per curiam opinion in which the court used a similar analysis and found a case of racial discrimination, despite testimony from a jury commissioner who claimed that he had not intended to racially discriminate.

Other cases found evidence of racial and ethnic discrimination when the defendant submitted evidence of historical exclusion or under-representation in comparison with eligible persons in accordance with U.S. Census figures. *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 1244 (1954); Reece *v. Georgia,* 350 U.S. 85, 76 S.Ct.

167, 100 L.Ed. 77 (1955); *Arnold v. North Carolina,* 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77 (1964).

In *Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), the court held that a grand jury was empaneled in a racially discriminatory manner where (1) there was evidence of under-representation of blacks on grand juries and (2) the jury commissioners made selections based on subjective factors such as whether the candidates were "upright" or "intelligent."

A similar result occurred in *Alexander v. Louisiana,* 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). In *Alexander,* a black man was charged with rape. The defendant presented evidence that in Lafayette Parish, 21 percent of the population consisted of blacks who were eligible for grand jury service. Despite this, the selection system, which included mailing questionnaires to eligible persons, resulted in 20 grand juries that had only 6.75 percent black members. On the defendant's 20-member grand jury venire, only one person was black. The Supreme Court reversed the defendant's conviction and remanded the case, even though the court found no evidence the jury commissioners consciously selected grand jurors by race. In doing so, the court said:

> [W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. The racial designation on both the

> questionnaire and the information card provided a clear and easy opportunity for racial discrimination.

Alexander, 405 U.S. at 630, 92 S.Ct. at 1225.

In Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972), the Supreme Court was faced for the first time with addressing racial discrimination in grand jury selection in (1) a habeas case, (2) where the criminal defendant was white and (3) where the state argued the conviction should not be reversed because the defendant could not show he was harmed. In reversing the case on due process grounds, the court said:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case.
>
> * * *
>
> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters, 407 U.S. at 503-504, 92 S.Ct. at 2169.

In *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the court summarized the development of standards in the case law. To prevail on a claim of racial discrimination in the selection of a grand jury, the test is: (1) the excluded group is recognizable and distinct and that has been singled out for different treatment under the laws as they are written or applied and (2) the group has been substantially under-represented over a significant period of time.

In subsequent cases, the Supreme Court has not wavered from this approach. In *Rose v. Mitchell,* 443 U.S. 546, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the court specifically rejected the argument that a defendant should have to demonstrate prejudice to obtain reversal based on an unconstitutionally selected grand jury. The court also found that habeas relief is proper when the defendant presents evidence to support such a finding. In *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the court rejected the State's claim that reversal of a conviction because of illegal discrimination in the selection of a grand jury is too high a price to pay because of the difficulty of having to re-try the defendant many years later.

> Yet intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the state to prevent. Thus, the remedy we have embraced for over a century - the only effective remedy for this violation - is not disproportionate to the evil it seeks to deter.

> If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it.
>
> *Vasquez,* 474 U.S. at 262, 106 S.Ct. at 617, footnote omitted.

(Petitioner greatfully acknowledges the research and effort of Magistrate Christine Noland in producing the preceding material.)

CONCLUSION

This Court should address the conflicts in the decisions by the Supreme Court of Louisiana, the United States Court of Appeals, Fifth Circuit, and the United States Court of Appeals, Eleventh Circuit, concerning whether a white defendant has standing to object to the race-based exclusion of grand jury forepersons on equal protection, due process, and fair cross-section grounds even if not of the same race as those excluded as grand jury forepersons. This Court should rule that petitioner, Terry Campbell, has standing to raise equal protection, due process, and fair cross-section claims that the grand jury foreperson selection process in Evangeline Parish discriminated against blacks, even though petitioner is a white male. Further, this Court should Quash the indictment handed down by an unconstitutionally constituted grand jury and remand the case for further proceedings.

Respectfully Submitted,
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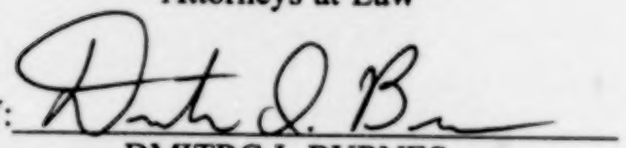
BY: 

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No. 96-1584

In the
Supreme Court of the United States
October Term, 1997

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

1 (a). Whether a white criminal defendant has standing to bring an equal protection claim based upon the exclusion of African-Americans from service as state grand jury foremen.

(b). Whether a white defendant has standing to bring a due process claim based upon the exclusion of African-Americans from service as state grand jury foremen.

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No. 96-1584

In the
Supreme Court of the United States
October Term, 1997

TERRY CAMPBELL,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF LOUISIANA

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On February 4, 1992, petitioner Terry Campbell, a white male, was indicted by a grand jury for the Thirteenth Judicial District, Parish of Evangeline, State of Louisiana, in the shooting death of James L. Sharp, also a white male. R. 19-20. Three of the indicting grand jurors were black. [1]

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[1] Counsel for petitioner and respondent herein have filed with the Court a pleading entitled *Joint Stipulation Of Counsel*, which was

Petitioner was formally charged with second-degree murder in violation of La. R.S. 14:30.1.[2] Following a 12-person jury trial, wherein Campbell peremptorily struck five blacks from the jury, petitioner was convicted as charged. R. 12-16. Six of the convicting jurors were black. On May 20, 1994, the trial judge sentenced petitioner to the mandatory term of life imprisonment without benefit of probation, parole or suspension of sentence. R. 18.

1. Background

The Louisiana Court of Appeal, Third Circuit, summarized the evidence underlying Campbell's conviction and sentence in its affirmation on appeal. *See State v. Campbell*, 673 So. 2d 1061, 1063-1064 (La. Ct. App. 3d Cir. 1996), *writ denied*, 685 So. 2d 140 (La. 1997), *cert. granted*

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pending before the Court at the time respondent's brief was being prepared. The joint stipulation was drafted in light of language in the *Powers v. Ohio*, 499 U.S., 400 (191), opinion that the record in that case "does not indicate that race was somehow implicated in the crime or the trial; nor does it reveal whether any black persons sat on petitioner's petit jury or if any of the nine jurors petitioner excused by peremptory challenges were black persons." *Powers*, 499 U.S. at 403. The record herein reveals that race was not a factor in petitioner's trial. Further, the stipulation shows that three blacks served on petitioner's grand jury, that six blacks served on the petit jury of 12 members (the alternate was also black), and that the petitioner used five of his maximum 12 peremptory challenges to strike five black prospective jurors, compared to the State's using one of its 11 peremptory strikes against a black prospective juror.

[2] Louisiana law provides that a person convicted of second-degree murder serves a mandatory sentence of life imprisonment without benefit of probation, parole or suspension of sentence. *See* Appendix A at 1A.. Furthermore, the Louisiana Constitution requires that any person subjected to life imprisonment must be charged by grand jury indictment. La. Const. art. 1, § 15 (1974), and La.C.Cr.P. art. 382(A) (West 1992). *See* App. G at 29A and App. B at 2A.

in part, Campbell v. Louisiana, __ U.S. __, 118 S. Ct. 29 (1997). *See also Pet.* at E-3 and E-4. During trial, petitioner, age 31, did not contest that, during the early morning hours of January 11, 1992, he shot to death Mr. Sharp, age 46, at the home of petitioner's estranged wife, Susan, following the victim having given Susan Campbell a ride home from an evening out with friends. Campbell shot the victim twice at close range as the victim was backing out of the driveway; the shooting caused the victim to lose control of his vehicle, ramming it into a natural gas meter. The victim, who died at the scene, had offered Susan Campbell a ride home when the girlfriend she had accompanied to the night club earlier in the evening wanted to stay longer. R. 410-420, 622-637.

During the first trial, which ended in a joint motion for a mistrial on January 12, 1994, the defense stipulated that the defendant had shot the victim and based the defense upon a plea of insanity. R. 8-11, 61-62, 410-420. In the second trial represented by new lawyers, Richard V. Burnes and Raymond LeJeune, and consistent with the earlier position of not contesting the shooting itself, petitioner again without the stipulation presented the defense of insanity, having previously entered a plea of not guilty and not guilty by reason of insanity. The defense of insanity stemmed from a head injury petitioner had received six years earlier. The evidence at trial was undisputed that on August 6, 1986, Campbell suffered a severe head injury, which doctors testified resulted in organic brain damage, chronic pain syndrome, and epileptic seizures. *Pet.* at E-3. *See also* R. 609-610, 622-637, 716-734, 756-757, 761-765, 870-871 and *State v. Campbell*, 673 So. 2d at 1063. Aside from the assignment of error on appeal concerning petitioner's motion to quash, which is now before this Court, the Louisiana Court of Appeal, Third Circuit, denied relief on all of petitioner's remaining assignments of error on appeal and

affirmed petitioner's conviction and sentence; the Louisiana Supreme Court on January 10, 1997, further declined to exercise its supervisory jurisdiction. *State v. Campbell*, 685 So. 2d 140 (La. 1997), *cert. granted in part, Campbell v. Louisiana*, __ U.S. __, 118 S. Ct. 29 (1997).

On April 2, 1997, petitioner filed a petition for writ of certiorari to this Court, based upon, *inter alia*, the denial of his motion to quash the grand jury indictment because of alleged racial discrimination in the selection of the grand jury foremen in Evangeline Parish, Louisiana.

On September 29, 1997, this Court granted the petition for writ of certiorari, limited to Question No. 1 as presented by the petitioner.

2. Motion to Quash Grand Jury Indictment

Prior to the first trial, petitioner's then-counsel Jesse B. Hearin filed a *Motion To Quash Grand Jury Indictment*, alleging that the indictment was defective because "the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and the Fourteenth Amendment to the United States Constitution . . . ." *Pet.* at F-2 and F-3. Following a hearing on the motion on December 2, 1993, the trial judge ruled that the petitioner, a white defendant, lacked standing under the Equal Protection Clause and/or Due Process Clause to complain about alleged racial discrimination, and therefore, denied the motion. *Pet.* at G-1 through G-34, H-1 and H-2. The trial court's oral reasons for judgment, summarily denied in a written order, do not specifically address petitioner's purported claim under the fair cross-section requirement of the Sixth Amendment. Further, because petitioner was found to lack standing, the trial judge did not rule whether petitioner had established a *prima facie* case of racial discrimination in the selection of grand jury foremen in Evangeline Parish, and hence the State

has yet to be afforded an opportunity to rebut, if necessary, a *prima facie* showing of racial discrimination.[3] The trial court subsequently issued its written judgment on December 6, 1993, confirming the denial of the motion to quash. *Pet.* at G-1 through G-34, H-1 and H-2.

On direct appeal to the Louisiana Court of Appeal, Third Circuit, petitioner again asserted as the first assignment of error the trial court's denial of the motion to quash the grand jury indictment. Petitioner also objected to the denial of his motion for a new trial on the same basis.

In *State v. Campbell*, 651 So. 2d 412, 413-414 (La. Ct. App. 3d Cir. 1995), *rev'd*, 661 So. 2d 1321 (La. 1995), *reh'g denied*, 661 So. 2d 1374 (La. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1673 (1996), *on remand*, 673 So. 2d 1061 (La. Ct. of App. 3d Cir. 1996), *writ denied*, 685 So. 2d 140

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[3] In petitioner's brief on the merits, Campbell seeks the reversal of his conviction. *See Pet. Br.* at 15 and 44. Likewise, the National Association Of Criminal Defense Lawyers (NACDL), also urges the reversal of petitioner's conviction. *See A. C. Br.* at 5 and 18. Both ignore the law and the record, which plainly demonstrate that if petitioner is successful in convincing this Court that he has standing on any claim for relief, the appropriate course of action is a decision by this Court on whether petitioner has established a *prima facie* case of racial discrimination and if so, a remand to the Thirteenth Judicial District Court to allow the State of Louisiana an opportunity to rebut that showing. In the alternative, this Court could simply vacate the Louisiana Supreme Court's ruling and remand to the district court with an order that the district court re-open the evidentiary hearing to rule on whether petitioner has established a *prima facie* case of racial discrimination and, if so, to allow the State an opportunity to present rebuttal evidence. *See Rose v. Mitchell*, 443 U.S. 545 (1979) and *Castenada v. Partida*, 430 U.S. 482 (1977)(both recognizing in the context of state grand jury foremen and state grand juries, respectively, that once the challenger establishes a *prima facie* case of racial discrimination, the State is afforded an opportunity to rebut that presumption). Petitioner's and *amicus'* contentions to the contrary urging summary reversal are simply erroneous and should be ignored.

(La. 1997), *cert. granted in part, Campbell v. Louisiana*, __ U.S. __, 118 So. 2d 29 (1997), the Third Circuit, in addressing petitioner's first assignment of error reversed the trial court's finding that petitioner, a white male, lacked standing to allege racial discrimination against blacks in the grand jury foreman selection process in Evangeline Parish based upon the Equal Protection Clause of the Fourteenth Amendment as interpreted by *Powers v. Ohio*, 499 U.S. 400 (1991). The Third Circuit further ordered the matter remanded for a full evidentiary hearing based upon defendant's equal protection and due process claims, finding that petitioner's statistical information was inadequate under *State v. Young*, 569 So. 2d 570, 575 (La. Ct. App. 1 Cir. 1990), *writ denied*, 575 So. 2d 386 (La. 1991).[4] *State v. Campbell*, 651 So. 2d at 413-414. Although the Court remanded the matter to the trial court on due process as well as equal protection grounds, there is no discussion in the Third Circuit's opinion related to this Court's decision in *Hobby v. United States*, 468 U..S. 339 (1984). *Id.* Further, the Third Circuit opinion does not address any perceived claim petitioner contends he made under the fair cross-section requirement of the Sixth Amendment. *Id.* Given the ruling of the Third Circuit, the Court did not reach petitioner's other assignments of error until the case was remanded to that Court following the Louisiana Supreme Court's decision denying the petitioner standing under the

[4] Quite remarkably, counsel for petitioner and *amicus* again fail to recognize the unequivocal ruling of the Third Circuit finding petitioner's proof of racial discrimination inadequate. First, one might even question whether petitioner should be allowed a second opportunity to establish a *prima facie* case of racial discrimination, having failed in the first instance. *See Rose, supra* at 573. Second, petitioner's counsel himself requested a remand to the trial court in his brief to the Louisiana Supreme Court. *See Joint Motion to Enlarge the Record* at 79-81.

Equal Protection and Due Process Clauses. *See State v. Campbell*, 661 So. 2d 1321, 1324 (La. 1995), *reh'g denied*, 661 So. 2d 1374 (La. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1673 (1996), *on remand*, 673 So. 2d 1061 (La. Ct. App. 3d Cir. 1996), *writ denied*, 685 So. 2d 140 (La. 1997), *cert. granted in part, Campbell v. Louisiana*, __ U.S. __, 118 S. Ct. 29 (1997). *See also Pet.* at D-2 through D-5, A-1 through A-8, E-2 through E-29, and B-1.

Following the Third Circuit's decision granting Campbell standing to proceed with his motion to quash the grand jury indictment, then-District Attorney J. William Pucheu filed an application for writ of certiorari and review with the Louisiana Supreme Court; in an opinion issued on October 2, 1995, the Supreme Court in *State v. Campbell*, 661 So. 2d 1321 (La. 1995), granted the State's writ application in a *per curiam* opinion, reversed the Third Circuit, and held that petitioner lacked standing to bring his equal protection and due process claims.

3. Decision of the Louisiana Supreme Court

In the opinion that is now the subject of review by this Court pursuant to 28 U.S.C. § 1257, the Supreme Court of Louisiana held that petitioner, as a white male, lacked standing under the Equal Protection Clause of the Fourteenth Amendment to bring a claim of racial discrimination against African-Americans in the selection process of grand jury foremen in Evangeline Parish, Louisiana. *See State v. Campbell*, 661 So. 2d at 1324. The Court denied petitioner's due process claim under *Hobby v. United States*, 461 U.S. 339 (1984), finding that the Louisiana's position of grand jury foreman is ministerial in nature, and therefore, constitutionally insignificant. The Court did not issue any opinion under the Sixth Amendment fair cross-section requirement. *Id.*

The Louisiana Supreme Court reasoned that Campbell lacked standing under *Rose v. Mitchell*, 443 U.S. 545 (1979), to press an equal protection claim. 661 So. 2d at 1322-1324. The Court expressly declined petitioner's invitation to extend *Powers v. Ohio*, 499 U.S. 400 (1991), to the context of state grand jury foremen. *Id.* Further, the Court ruled that given the ministerial nature of Louisiana's grand jury foremen, this Court's holding in *Hobby*, precluded any relief under the Due Process Clause. *Id.* Following its decision, the Louisiana Supreme Court remanded the case back to the Third Circuit for consideration of petitioner's remaining assignments of error on appeal, all of which were subsequently denied by the lower appellate court and upon which the state's highest court declined to invoke supervisory jurisdiction. *Id.* and 685 So. 2d 140 (La. 1997).

SUMMARY OF THE ARGUMENT

1. Petitioner, as a white male, has not and cannot meet his burden of establishing standing under the Equal Protection Clause of the Fourteenth Amendment, either under Article III of the United States Constitution, or under this Court's decision in *Powers v. Ohio*, 499 So. 2d 400 (1991), related to *jus tertii* (third-party) standing, given the nature of his alleged injury and the alleged targets of the racial discrimination.

First, under Article III, petitioner was required to establish the three essential components of standing: an injury-in-fact; causation; and redressability. He has failed to do this and therefore there is no case or controversy as constitutionally required by Article III.

Second, this Court's decision in *Powers*, as illustrated by the more recent racial gerrymandering decision of *United States v. Hays*, __ U.S. ___, 115 S. Ct. 2431 (1995), should not be extended to afford Campbell third-party standing. Unlike an illegal peremptory challenge that excludes a particular individual from petit jury service, Campbell's complaint is far more general. Campbell alleges that the judges of the Thirteenth Judicial District Court, Parish of Evangeline, specifically excluded undisclosed African-Americans (whose identities he has yet to prove despite no showing that the data is not available) from service over a 16½-year period of time as foremen of 35 different grand juries on the basis of their race. Because Campbell's claim is more closely akin to the challengers' claims of racial gerrymandering in *Hays*, this Court's analysis in *Hays* recognizing that plaintiffs' claim of racial gerrymandering as only a "general grievance" should apply with equal force in the context of alleged racial discrimination against African Americans in the service as state grand jury foremen brought by a white criminal defendant.

Accordingly, the rationale of *Powers* does not apply because Campbell only alleges a "general grievance" of racial discrimination shared by all citizens of the State of Louisiana. Therefore, this Court should hold that a white criminal defendant does not have standing under the Equal Protection Clause of the Fourteenth Amendment to complain of racial discrimination in the selection process of state grand jury foremen, absent membership in the excluded class. Such a limitation on the logical extreme of *Powers* is historically consistent with this Court's equal protection analysis long ago recognized in *Rose v. Mitchell*, 443 U.S. 545 (1979), and *Castaneda v. Partida*, 430 U.S. 482 (1977).

2. The position of grand jury foreman under Louisiana law, as recognized by the State's highest court in *State v. Campbell*, 661 So. 2d. at 1324, is constitutionally

insignificant in that the functions of that position are ministerial in nature. In contrast to the state grand jury foreman's role at issue in the Tennessee system in *Rose,* a Louisiana grand jury foreman has no special power not shared by the remaining 11 members and two alternates. The Louisiana grand jury foreman's duties are plainly ministerial, similar to those at issue in the federal grand jury system analyzed in the *Hobby* decision. Given the ministerial nature of the Louisiana grand jury foreman, and this Court's decision in *Hobby*, petitioner cannot prevail under the Due Process Clause given no constitutionally protected interest is being infringed.

3. Petitioner has never adequately presented his Sixth Amendment claim to any state court. No state court has ever ruled on this claim. Therefore, Campbell's fair cross-section claim is not properly before this Court and should be denied. *Adams v. Robertson*, __U.S.__, 117 S.Ct. 1028, 1029 (1997).

Further, no Sixth Amendment right attaches to the position of grand jury foreman. The right to an impartial jury guaranteed by the Sixth Amendment demands that jury members be drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). While a defendant who is denied this right is entitled to challenge the composition of such a venire regardless of whether he or she is a member of the underrepresented group, *Holland v. Illinois*, 493 U.S. 474 (1990), the Sixth Amendment right to an impartial jury does not attach to the single grand jury foreman position. In a fair cross-section analysis the focus is on the system and whether it yields an impartial jury. This analysis only applies to groups, such as a grand or petit juries, which can represent society as a whole. The individual grand jury foreman alone cannot be a fair cross-section of his or her community.

ARGUMENT

I. A white criminal defendant should be denied standing under the Equal Protection Clause of the Fourteenth Amendment to bring a claim of racial discrimination against African-Americans in the selection process of state grand jury foremen.[5]

Without any analysis or explanation, petitioner summarily argues to this Court that racial identity between himself and the alleged racially excluded prospective grand jurors from service as grand jury foremen is "irrelevant" despite this Court's express holdings in the two controlling cases, *Rose v. Mitchell*, 443 U.S. 545 (1979), and *Castaneda v. Partida,* 430 U.S. 482 (1977),[6] based upon this Court's

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[5] Louisiana law refers to this position on a state grand jury as "foreman" regardless of gender. *See* La.C.Cr.P. art. 413 (West 1992) and (West 1997). We adopt the practice herein.

[6] In *Rose* this Court reviewed the *habeas corpus* claim of two black prisoners attacking the lack of a black grand jury foremen in Tipton County, Tennessee. This Court relied on its prior decision in *Castaneda* where the Court considered allegations of discrimination in the selection of grand jurors in Texas brought by a Mexican-American defendant concerning the exclusion of other Mexican-Americans. *Rose* adopted the three-prong test used in *Castaneda* for an equal protection claim: "Thus, in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of *his race or of the identifiable group to which he belongs.* The first step is to establish that the group is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time .... Finally,...a selection process that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." *Castaneda*, 97 S.Ct. at 494-495 (citations omitted, emphasis added).

earlier plurality decision in *Peters v. Kiff*, 407 U.S. 493 (1972) and in light of this Court's more recent 7-2 decision of *Powers v. Ohio*, 499 U.S. 400 (1991). *See Br. Pet.* at 15, 17-20, 28-31 and 44. Campbell argues that ["T]herefore, as in *Powers*, the fact that petitioner's race differs from that of the excluded members is irrelevant to the analysis of his standing to object to the discriminatory practice in question." *Br. Pet.* at 31 (emphasis in original). The NACDL, as *amicus curiae*, makes the same conclusory analysis that the result herein under the Equal Protection Clause is a "foregone conclusion" and is "simply the logical, necessary, and inexorable application of this Court's prior case law." [7] *See A.C. Br.* at 4-5, 9.

To the contrary, the State of Louisiana respectfully submits that *Powers* and the earlier plurality decision in *Peters*, which was based on the Due Process Clause and federal statutory law, do not, *ipso facto*, grant a white defendant standing under the Equal Protection Clause of the Fourteenth Amendment when one considers the alleged targets of racial discrimination and the vast difference between the judicial bodies at issue. Moreover, contrary to Campbell's argument, this Court should expressly decline petitioner's invitation to expand *Powers* beyond the context of peremptory challenges of prospective petit jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. While the petitioner and *amicus* assert that the Louisiana Supreme Court misapplied this Court's holdings when it denied Campbell standing to pursue equal protection and due process claims, the opposite is true. In light of this Court's

[7] If the Louisiana Supreme Court's decision in this matter was controlled by *Powers*, then one would presume that this Court would vacate that portion of the decision and remand in light of *Powers*. Obviously, this Court's granting of the petition for writ of certiorari suggests that the result is not a "foregone conclusion."

most recent decision on the issue of standing in *United States v. Hays*, ___ U.S. ___, 115 S.Ct. 2431 (1995), the Supreme Court of Louisiana correctly refused petitioner's invitation to disregard the judicial restraint encompassed in that doctrine. Further, the Louisiana Supreme Court's denial of standing under the Due Process Clause is entirely consistent with *Hobby*.

A. Petitioner, as a white male, has not and cannot demonstrate either Article III standing or *jus tertii* standing under *Powers v. Ohio*, 499 U.S. 400 (1991), given the uncontested fact that the targets of his equal protection claim of alleged racial discrimination are undetermined African-Americans residing in Evangeline Parish, Louisiana.

1. Article III standing

In the context of equal protection, standing under Article III of the United States Constitution requires that Campbell demonstrate why this Court must entertain his claim of racial discrimination against a-class of people to whom he himself does not belong. A plaintiff is generally precluded "from asserting a generalized injury, often said to be suffered 'by all or a large class of citizens.' " Guilds, *A Jurisprudence Of Doubt: Generalized Grievances As A Limitation To Federal Court Access*, 74 N.C.L.R. 1863, 1864 (1996), citing *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

In two equal protection cases, *United States v. Hays*, __ U.S. __, 115 S.Ct. 2431, 2435 (1995) (involving voting rights and racial gerrymandering of Congressional districts) and *Allen v. Wright*, 468 U.S. 737, 751 (1984) (involving racial segregation), this Court denied federal court access to plaintiffs despite their claims of racial discrimination. In

light of petitioner's concession that Louisiana's method of selecting state grand jury foremen is not, *per se*, unconstitutional and in light of the constitutionally insignificant role of a state grand jury foreman under Louisiana law, as fully explained *infra*, petitioner has not shown the necessary elements sufficient to establish standing for purposes of an equal protection claim. *See Pet. Br.* at 7 ("[p]etitioner asserted that the grand jury foreperson selection process *as applied* in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clause . . . . ") (emphasis in original).

At a minimum, and based upon the doctrines of federalism and separation of powers, Article III requires that a plaintiff establish three prerequisites prior to gaining redress for a claimed federal constitutional violation: an injury-in-fact, by which this Court means "a legally protected interest that is [both] 'concrete and particularized and actual or imminent, not conjectural or hypothetical,' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)(plurality opinion)(plaintiffs lacked standing for failing to demonstrate their injury was sufficiently "actual or imminent" in that they claimed only to return someday to areas of the world where particular endangered species lived); "a causal relationship between the injury and the challenged conduct," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976)(". . . we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.")(citation omitted); and "a likelihood that the injury will be redressed by a favorable decision." *See* Flickinger, *Standing In Racial Gerrymandering Cases*, 49 Stan.L.R. 381, 384-385 (1997). *See also Simon*, 426 U.S. at

45 (". . . the complaint suggest no substantial victory in this suit would result in respondents' receiving the hospital treatment they desire.")

a. Injury-in-fact

Campbell does not argue that he personally has standing to complain, as a white criminal defendant, that African-Americans residing in Evangeline Parish, Louisiana, were denied an opportunity to serve as foremen of that parish's grand juries for the past 16 ½ years under general standing principles. At the hearing on the motion to quash, petitioner's trial counsel, Mr. Hearin, told the trial court: "But, Terry's rights have not been violated. Terry is asserting third party rights of those excluded." *See Pet.* at G-9. In the context of equal protection, the only standing case of this Court that petitioner cites to this Court is *Powers v. Ohio*, a third-party standing case. *See Pet. Br.* at 27-31.

In addition to petitioner's express concession, the record before this Court does not establish that Campbell has Article III standing given the undisputed fact that Campbell is not a member of the allegedly excluded class, and he has not shown any imminent or actual injury to himself. In *O'Shea v. Littleton*, 414 U.S. 488 (1974), *judgment vacated, Spomer v. Littleton*, 414 U.S. 514 (1974), this Court denied standing to plaintiffs seeking an injunction against allegedly discriminatory enforcement of criminal laws; despite what might have been termed "past wrongs," this Court declined Article III standing without a showing that plaintiff's injuries are "sufficiently real and immediate to show an existing controversy." *Id.*, at 496. *See also Los Angeles v. Lyons*, 461 U.S. 95, 110-113 (1983) (recognizing imminent injury needed for standing to seek injunctive relief; plaintiff did not have standing to request an injunction against the Los Angeles Police Department to prevent future use of

unconstitutional choke holds. While plaintiff himself may have suffered personal injury from such a choke hold, such a past injury did not afford him standing for injunctive relief). While admittedly Campbell is not seeking an injunction against the judges of the Thirteenth Judicial District to prohibit them from selecting state grand jury foremen, given the fact that petitioner is not a member of the harmed class, he, unlike the plaintiffs in *O'Shea* and *Lyons*, has not alleged and cannot allege any personal injury to himself.

Further, Campbell has no proven actual injury. In the death penalty standing case of *Whitmore v. Arkansas,* 495 U.S. 149, 157-158 (1990), this Court declined to allow one death row inmate standing to intervene on behalf of another death row inmate, who had waived his right to appellate review. In writing for this Court, Chief Justice Rehnquist called the injury "too speculative" when the inmate claimed that he was harmed because data concerning the other inmate's case would not be added to the Arkansas database. *Id.* at 157.

Likewise, there is no merit to Campbell's position that a white male criminal defendant who was indicted by a 12-member grand jury composed of nine whites (including the white grand jury foreman) and three blacks was personally harmed because judges had presumptively excluded African-Americans from service as foremen for the past 16 ½ years. *See also Joint Stipulation Of Counsel, supra,* note 1, p. 1-2.

b. Causation and redressability

Campbell has the burden of establishing causation[8] and redressability, the two other components of standing

[8] As noted previously, *supra* at 6, the Third Circuit for the Louisiana Court of Appeals rejected petitioner's statistical data as insufficient under *State v. Young, supra,* because the only data provided related to the general population statistics for Evangeline Parish and the racial breakdown for registered voters in Evangeline Parish despite the fact that state grand jury venires may be drawn from numerous other sources, such as motor vehicle license and registration records or utility customers, depending on the judicial district. *See* La.C.Cr.P. art. 414 (West 1992). *See also State v. Campbell,* 651 So. 2d at 412-414, and 673 So. 2d at 1063. This finding was made despite the District Attorney and the defense stipulating to the testimony of the registrar of voters, which would support the inference that, for the past 16 ½ years, all foremen in Evangeline Parish were white. Accordingly, given the uncontested holding of the Third Circuit, the State of Louisiana relies upon the record in this Court that petitioner has failed to establish the middle component of standing -- causation. *See also James v. Whitley,* 39 F. 3d 607, 611 (5th Cir. 1994)(black criminal defendant failed to prove the degree of underrepresentation required to establish an equal protection claim despite inferential evidence that no black had served as grand jury foreman in Ascension Parish, Louisiana, since 1965, and the black population of Ascension Parish for the time period in question was 27 percent.)

under Article III. While redressability is related to injury-in-fact and causation, redressability requires that it be " 'likely' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.' " Guilds, *supra,* at 1874-75. *See also Allen, supra,* 468 U.S. at 753 n.19 (" [t]o the extent there is a difference [between causation (i.e. "fairly traceable") and redressability], it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested.")

To establish standing, this Court must find that Campbell, as a white male, is entitled to the relief he is seeking. Campbell assumes that "the rule of automatic reversal," *Vasquez v. Hillary,* 474 U.S. 254, 272 (1986) (Powell, J. dissenting), logically applies to a reversal of an

otherwise fair conviction on account of alleged racial discrimination in the selection of the indicting grand jury foreman. *Rose v. Mitchell* is certainly no such case: "Each respondent is a Negro." 443 U.S. at 548. To apply such a draconian prophylactic to Campbell's case, we respectfully submit, simply goes too far. "All rights tends to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908)(per HOLMES, J.), *overruled other grds., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). Campbell's indicting grand jury included three African-Americans, and it is difficult to perceive how his alleged claim of discrimination in the selection of the ministerial foreman at issue here constitutes "injury in fact" to him -- "distinct *and papable*," *Warth v. Seldin*, 422 U.S. 490, 501 (1975)(emphasis added), "particular [and] *concrete*," *United States v. Richardson*, 418 U.S. 16, 17 (1974)(emphasis added), "specific [and] *objective*," *Laird v. Tatum*, 408 U.S. 1, 14 (1972)(emphasis added).

In Terry Campbell's case, we submit, the societal costs of releasing a fairly convicted killer outweigh this Court's rigorous *Rose* rejection of Mr. Justice Jackson's competing practical wisdom. *See Cassell v. Texas*, 339 U.S. 282, 298 (1950)(JACKSON, J., dissenting).

The State of Louisiana submits further that Campbell is not the proper champion of his purported cause of eliminating racial discrimination against African-Americans in the selection of grand jury foremen. In particular, we strenuously object to *amicus'* suggestion that unless white criminal defendants are given standing under the Equal

Protection Clause, black criminal defendants in Louisiana are without an effective forum to seek redress for wrongs committed against their race. *Amicus* NACDL argues to this Court that "the fact that racial discrimination in the selection of grand jury foreman persists in Louisiana to this day, provides a perfect illustration of why defendants, regardless of their race, have standing to challenge the exclusion of identifiable classes from jury service, since obviously, in the seventeen years since *Guice*, [presumably *Guice v. Fortenberry [Guice II]*, 722 F. 2d 276 (5th Cir. 1984)] the excluded class itself has not pursued any challenge to the discriminatory practice." *A.C. Br.* at 14 (citations omitted).

Amicus' argument is patently incorrect in light of a long line of cases to the contrary, which demonstrate that black criminal defendants in Louisiana have brought forth equal protection claims regarding the exclusion of blacks from service as state grand jury foremen. *See Williams v. Cain*, 125 F. 3d 269 (5th Cir. 1997)(claim of race discrimination in selection of foreman of grand jury was procedurally barred); *Deloch v. Whitley*, 684 So. 2d 349 (La. 1996)(same); *James v. Whitley*, 39 F. 3d 607 (5th Cir. 1994), *cert. denied*, 514 U.S. 1069 (1995); *State v. Davis*, 626 So. 2d 800 (La. Ct. App. 2d Cir. (1993), *writ denied*, 632 So. 2d 762 (La. 1994)(African-American defendant failed to show venire systematically excluded persons on basis of race); *State ex rel. Williams v. Whitley*, 629 So. 2d 343 (La. 1993); *State v. Mays*, 612 So. 2d 1040 (La. Ct. App. 2d Cir. 1993), *writ denied*, 619 So. 2d 576 (La. 1993); *State v. Thomas*, 609 So. 2d 1078 (La. Ct. App. 2d Cir. 1992), *writ denied*, 617 So. 2d. 905 (La. 1993) (black defendant failed to establish *prima facie* case that selections of grand jury foremen in Caddo Parish was discriminatory); *State v. Young*, 569 So. 2d 570 (La. Ct. App. 1 Cir. 1990), *writ denied*, 575 So. 2d 386 (La. 1991); *State v. James*, 459 So. 2d 1299, 1308 (La.

Ct. App. 1 Cir. 1984), *writ denied*, 463 So. 2d 600 (La. 1985)(black defendant had not established a *prima facie* case of discrimination in the selection of state grand jury foremen because defendant did not establish the number of grand juries that were convened or the number of foremen appointed); *Boykins v. Maggio*, 715 F. 2d 995 (5th Cir. 1983), *cert. denied, Boykins v. Blackburn*, 466 U.S. 940 (1984); *Guice v. Fortenberry, [Guice I]*, 661 F. 2d 496 (5th Cir. 1981)(*en banc*)(absent positive proof of the actual number of grand jury foremen chosen, black defendants had not proven a *prima facie* case of discrimination in the selection of state grand jury foremen; evidence based on statutory requirements only inferential evidence, not positive proof); *Guice II*, 722 F. 2d 276 (5th Cir. 1984);and *State v. Barksdale*, 170 So. 2d 374 (La. 1964), *cert. denied, Barksdale v. Louisiana*, 382 U.S. 921 (1965).

2. *Jus tertii* standing in light of *Powers v. Ohio*, 499 U.S. 400 (1991)

The State respectfully submits that this Court's rationale of allowing a white criminal defendant in *Powers* third-party standing to seek redress for the exclusion of particular black prospective petit jurors on the basis of their race is not applicable to the position of grand jury foreman. Your Honors should decline to extend *Powers* to this context, lest this Court's constitutional constructs reach too high: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one too many is added." *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (Opinion of JACKSON, J.).

Despite the *Powers* decision, this Court in *United States v. Hays*, *supra*, held that white plaintiffs who lived outside the voting district in question would be denied standing under the Equal Protection Clause of the Fourteenth Amendment to bring a claim against racial gerrymandering because those plaintiffs "have not otherwise demonstrated that they, personally, have been subjected to a racial classification." *Hays*, 515 U.S. at 739.

In *Hays*, this Court held that the plaintiffs had presented only a "general grievance against allegedly illegal governmental conduct" which was insufficient to establish standing. *Id.* at 743. This Court stated:

> The rule against generalized grievances applies with as much force in the equal protection context as in any other. *Allen* v. *Wright* made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct."

Id., at 743-44. And more: "Only those citizens able to allege injury 'as a direct result of having personally been denied equal treatment' may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits." *Id.* at 746, (citations omitted).

We say the same thing here. Campbell is attempting to stand in the shoes of numerous African-Americans included on voter roles (and perhaps other venire sources which petitioner has yet to identify despite the absence of any showing that the information is not a matter of public record) who allegedly have been denied the right to sit as foremen of an Evangeline Parish grand jury for the past 16 ½

years. This is akin to the type of harm realized in the case of racial gerrymandering of congressional voting districts and is not the type of personal injury upon which the *Powers* court allowed third-party standing.

The State submits that the interests relied upon by this Court in *Powers* are not present when the judicial entity in question is the foreman of the state grand jury as opposed to the petit jury deciding the ultimate question of guilt or innocence. First, the alleged constitutional violation in the context of service as state grand jury foremen does not occur during the trial itself. Second, the integrity of the verdicts of the grand and petit juries are not called into question. Third, the relationship between a white criminal defendant and the excluded class of prospective grand jurors of another race who were not called to serve as state grand jury foremen for the prior 16 1/2 years is tenuous, at best. Fourth, unlike the undisputed remedy of reversal available to a successful litigant in the context of *Batson* and its progeny and in the context of racial discrimination in the selection of the state grand jury itself under *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986)[9], the remedy under a proven *Rose* claim has never

[9] The State of Louisiana recognizes this Court's decision that if discrimination in the selection of the *grand jury itself* occurs, the proper remedy is reversal of the subsequent conviction. The State, however, suggests that, for reasons enunciated by Justice Powell in dissent, the same remedy is not constitutionally required if the discrimination in *Vasquez* occurs only in the selection of the grand jury foreman, as *Hobby, supra*, illustrates. *See Vasquez*, 474 U.S. at 255-283 (Powell, J., dissenting, in which Burger, C.J., and Rehnquist, J. joined). *See also United States v. Musto*, 540 F. Supp. 346, 361 (D.N.J. 1982)(holding that underrepresentation of women as grand jury foremen did not require dismissal of indictments, noting that *Rose* was "merely dictum" as it concerns a finding that the role of grand jury foreman was a constitutionally significant function, and observing that the Fifth Circuit in *Guice I* "followed the dictum...without elaboration") and *Ford v. Seabold*, 841 F. 2d 677, 689 (6th Cir. 1988), *cert. denied*, 488 U.S. 928 (1988)(reversal of conviction on ground that blacks were excluded from jury commission for a 20-year period not required since Ford "suffered no prejudice and any discrimination in the appointment of the commissioners would not undermine the integrity of the indictment and conviction. . . .")

been squarely ruled upon by this Court, certainly not as to a white defendant.[10]

II. Article III of the United States Constitution requires that a white criminal defendant be denied standing under the Due Process Clause of the Fourteenth Amendment to bring a claim of racial discrimination against African-Americans in the selection process of state grand jury foremen in that the ministerial nature of that position affords him no remedy, and petitioner has not otherwise established the standing prerequisites.

Petitioner has failed to carry his burden of proving standing under the Due Process Clause in that he had made no attempt to establish the prerequisite standing requirements

[10] Counsel for respondent is well aware of the Fifth Circuit line of cases that require automatic reversal. The Fifth Circuit in *Guice I* held that reversal was the proper remedy by simply "[a]ccepting the Supreme Court's assumption that discrimination in the selection of a grand jury foremen in violation of the equal protection clause mandates that the conviction be vacated." *Guice I*, 661 F. 2d at 499 (footnote omitted). But even the Fifth Circuit is not so doctrinaire as to accept Campbell's submissions to this Court. *See United State v. Cronn*, 717 F.2d 164 (5th Cir. 1983), *cert. denied, Cronn v. United States*, 468 U.S. 1217 (1984)(Anglo male defendant without standing to assert, on equal protection grounds, that females and racial minorities were underrepresented as grand jury forepersons.) Viewing the "assumption" in *Rose* in light of the more recent *Hobby* decision decided under the Due Process Clause of the Fifth Amendment, the *Hobby* decision strongly suggests that reversal is not constitutionally required.

of Article III outside the boundaries of the *Powers* decision. Campbell has not alleged that he personally was injured as to establish "an injury-in-fact." Further, he has failed to establish causation. Finally, in light of this Court's decision in *Hobby,* Campbell has failed to contest the ministerial nature of the Louisiana grand jury foreman position, and therefore, due process affords him no remedy even assuming a violation occurred.

In entertaining petitioner's pre-trial motion to quash the grand jury indictment, the trial court held that Campbell lacked standing to bring a claim under the Equal Protection and/or Due Process Clauses. *See Pet.* G-31 through G-33. While the parties to the evidentiary hearing discussed the *Hobby* decision, the trial court's oral reasons for judgment simply state that petitioner lacked standing under both the Equal Protection and/or the Due Process Clauses.

The decision of the Louisiana Third Circuit Court of Appeal finds standing under the Equal Protection and Due Process Clauses, but only cites this Court's opinion in *Powers,* which is clearly only an equal protection case. The Third Circuit does, however, suggest that the role of a Louisiana grand jury foreman may be merely ministerial. *See Pet.* at D-2 through D-5.

Finally, the Louisiana Supreme Court relies on both *Rose* and *Hobby* when it finds that Campbell did not have standing under either the Equal Protection or the Due Process Clauses of the Fourteenth Amendment. [11]

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[11] The Louisiana Supreme Court held that "[u]nder *Hobby*, defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the 'ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post

In *Hobby* this Court refused to reverse a federal conviction of a defendant who had alleged racial discrimination against blacks and women in the selection of the grand jury that indicted him. This Court noted that "the responsibilities of a federal grand jury foreman are essentially clerical in nature." 468 U.S. at 344. Thus, this Court concluded that, "[s]imply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." *Id.* at 345.

A. The duties of a state grand jury foreman are ministerial as defined by *Hobby v. United States*, 468 U.S. 339 (1984), and therefore, are of no constitutional significance.

The role of the grand jury foreman in Louisiana, as in the federal system, is ministerial only. Although prior decisions of the Fifth Circuit found reversal was the proper remedy, those decisions did not address the role of the state grand jury foreman in Louisiana. Further, the Louisiana Supreme Court has itself determined that "[t]he role of the grand jury foreman in Louisiana appears to be similarly ministerial." *State v. Campbell,* 661 So. 2d at 1324. *See also State of Louisiana ex rel. Williams v. Whitley*, 629 So. 2d 343 (La. 1993)(Marcus, J., dissenting, "[t]he role of the foreman of the grand jury in Louisiana appears to be ministerial in nature.").

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significantly invades the distinctive interests of the defendant protected by the Due Process Clause.' " *State v. Campbell,* 661 So. 2d at 1324.

Quite notably, petitioner has neither claimed that La.C.Cr.P. art. 413 is unconstitutional under any provision of the United States Constitution nor has he attacked the selection process of the grand jury venire itself.[12] Instead, petitioner limits his attack to saying that art. 413 "*as applied*" violates his equal protection rights. *See Br. Pet.* at 7.

Further, Louisiana law supports a finding that the position of grand jury foreman is ministerial. La.C.Cr.P. art 436 (West 1992) provides that a foreman "shall preside over all hearings", "may delegate duties to other grand jurors" and "may determine rules of procedures." All witnesses shall be sworn by the grand jury foreman prior to testifying. La.C.Cr.P. art. 440 (West 1992). Nine of the grand jurors are required to concur in "a true bill" or "not a true bill," and the indictment must be signed by the foreman, and the lack thereof forms one of the basis to quash the bill of indictment. La. C.Cr.P. arts. 383, 444 and 533(5) (West 1992).[13]

At one time Louisiana jurisprudence held to the effect that the failure to comply with the statutory requirement of La. C.Cr.P. art. 383 (that an indictment must be signed by the grand jury foreman) was a fatal defect in the document. *State v. Stoma*, 6 So. 2d 650 (1942) and jurisprudence relied on therein. Under present Louisiana law, the absence of this signature has been termed a "procedural irregularity" and a

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[12] In *Guice II* the Fifth Circuit noted that "because the foreman [in Louisiana is] selected from the venire rather than from the grand jury itself, any discrimination in the selection of a foreman necessarily taint[s] the composition of the grand jury as well: only eleven of its twelve members were chosen at random." *Guice II*, 722 F. 2d at 282 n. 6. If that is so, petitioner may obtain relief by challenging the composition of the grand jury, and this he has failed to do.

[13] A defendant must also file a motion to quash the grand jury indictment on the basis of racial discrimination in the selection process or else the claim is likewise waived. *See Deloch v. Whitley, supra.*

"technical insufficiency" which may be regarded as waived if not raised prior to at least the verdict. *State v. Mouton,* 319 So. 2d 33, 319 So. 2d 331, 332 (La. 1975), relying on *State v. James*, 305 So. 2d 514 (La. 1974).

In *James* the Louisiana Supreme Court concluded that: "[W]here in fact an accused has been fairly informed on the charge against him by the indictment and has not been prejudiced by surprise or lack of notice, the technical sufficiency of the indictment may not be questioned after conviction where, as here, no objection was raised to it prior to the verdict . . . " *Id.* at 516.

The Court in *Mouton* recognized that the reasons for requiring the signature of the foreman on an indictment involves "accentuating the deliberateness of the grand jury's finding" and that such interests are adequately served when a "duly designated representative on the grand jury such as an assistant foreman, signs due to the absence, inability or unwillingness of the foreman to sign.:

> We are unwilling to believe that the legislature intended to prevent any action by the grand jury unless concurred in by the foreman. He is only one of twelve grand jurors, of whom nine only need concur to find a true bill or not.

State v. Mouton, supra. at 332, La.C.Cr. P. arts. 413, 444 (B).

The State submits it can hardly be construed that this signature requirement is important enough to raise the position of grand jury foreman to the level of constitutional significance required to establish a violation of the Due Process Clause of the Fourteenth Amendment.

A grand juror who objects to a rule of procedure implemented by the grand jury foreman may apply to the court for a determination of the matter. La.C.Cr.P. art. 436. This authority of any grand juror to appeal to the court

prevents autocratic control by the foreman. Further, while the Tennessee grand jury foreman at issue in *Rose* served for two years terms on successive grand juries and actively assisted the Tennessee district attorney in criminal investigations, the counterpart in Louisiana has no investigative power not shared as a whole with the 11 other grand jurors, is presumably replaced every six months as is the entire grand jury, and it is the grand jury as a body that issues subpoenas and subpoenas *duces tecum*.

Because a Louisiana grand jury foreman performs only clerical duties, discrimination in the selection of a foreman "does not in any sense threaten the interests of the defendant protected by the Due Process Clause."[14] *Hobby*, 468 U.S. at 344. *See also United States v. Musto*, 540 F. Supp. 346 (D.N.J. 1982), *judgment aff'd, United States v. Aimone*, 715 F. 2d 822 (3d Cir. 1983), *cert. denied, Dentico v. United States*, 468 U.S. 1217 (1984) and *Musto v. United States*, 468 U.S. 1217 (1984)(duties of federal grand jury foreman ministerial; refusing to quash indictment because women had not been appointed as foremen over five-year period affirmed); *Andrews v. State*, 443 So. 2d 78 (Fla. 1983)(assuming discrimination in selection of grand jury foreman, such discrimination would not require quashing where role of foreman ministerial).

For the foregoing reasons, the Louisiana Supreme Court correctly decided that Campbell failed to establish the necessary prerequisites to establish standing to raise a claim under the Due Process Clause of discrimination against a class to which he does not belong.

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[14] The State of Louisiana respectfully submits that the discussion of the ministerial nature of the position of grand jury foreman in *Hobby* is applicable to any examination of this issue, regardless of the constitutional basis on which a challenge is made.

III. While a white male defendant has standing under the Sixth Amendment to seek redress for a claim that the grand jury that indicted him does not represent a fair cross-section of the community, such a claim is not applicable to the position of state grand jury foreman.

A. Petitioner's Sixth Amendment claim was never properly presented to any state court.

Petitioner claims he is entitled to federal review on the basis of a fair cross-section analysis under the Sixth Amendment. A review of the record herein demonstrates that Louisiana state courts did not rule on petitioner's Sixth Amendment fair cross-section claim because petitioner never adequately presented such a claim to these courts. Furthermore, even before this Court, petitioner has focused his claims for relief only on the Equal Protection and the Due Process Clauses of the Fourteenth Amendment and has not cited the leading fair cross-section cases of *Holland v. Illinois*, 493 U.S. 474 (1990), and *Duren v. Missouri*, 439 U.S. 357 (1979). While petitioner summarily articulated the terms "Sixth Amendment" and "fair cross-section" in pleadings or briefs, the mere articulation of these terms cannot and should not be construed, in any sense, as a fair or proper presentation of the issue to either the state courts or to this Court.

More importantly, no state court including Louisiana's highest court, has ever acknowledged or ruled upon either standing to bring such a claim or its merits. With "very rare exceptions" this Court will not consider a petitioner's federal claim unless it was addressed by, or properly presented to, the state court that rendered the decision to be reviewed. Further, when the highest state court is silent on a federal question, it is assumed that the issue

was not properly presented and the aggrieved party bears the burden of defeating this assumption by demonstrating the state court had a "fair opportunity to address the federal question that is sought to be presented . . . ." *Adams v. Robertson*, ___U.S.___, 117 S.Ct. 1028, 1029 (1997).

Petitioner has therefore failed to demonstrate that the state courts of Louisiana had a fair opportunity to pass upon his Sixth Amendment fair cross-section claim. It is evident from the record[15] that petitioner has elected to pursue no broader or additional claims beyond the equal protection and due process challenges. At best, his Sixth Amendment challenge is a potential contention that was never advanced in or entertained by any state court.

Review on the basis of a Sixth Amendment claim is not warranted.

B. No Sixth Amendment right attaches to the position of state grand jury foreman.

If this Court decides that the Sixth Amendment itself is implicated regardless of whether the judicial body at issue is the grand jury, or just the grand jury foreman, then the State concedes that under *Holland v. Illinois*, petitioner has standing to assert a Sixth Amendment challenge.

A claimed violation of the Sixth Amendment involves the issue of whether a defendant has been denied the right to an impartial jury and, in particular under the present facts, whether the selection process and role of the grand jury foreman implicate or threaten petitioner's right to an impartial jury. The Sixth Amendment guarantees all criminal defendants the right to a "speedy and public trial, by an impartial jury." This right demands that jury members be

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15 *See Joint Motion to Enlarge the Record, supra.*

drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). It is well established that the Sixth Amendment right to trial by an impartial jury includes the right to be indicted by a grand jury composed of members drawn from a source representing a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357 (1979). The Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross-section of the community, whether or not the systematically excluded groups are groups to which he himself belongs. *Holland v. Illinois*, 493 U.S. 474 (1990).

In a fair cross-section challenge "the focus is not on discriminatory conduct but instead is on whether the jury selection system is impartial and will yield a microcosm of the community which can fairly represent the views of all persons within the society." *Taylor, supra*, 419 U.S. at 522. *Holland*, 493 U.S. at 480.

Even if Campbell possesses standing under the Sixth Amendment to challenge the grand jury foreman selection process, it is the contention of the State of Louisiana that the Sixth Amendment right to an impartial jury has no application to the position of grand jury foreman. *United States v. Sneed*, 729 F.2d 1333, 1335 n.2 (11th Cir. 1984); *United States v. Holman*, 680 F.2d 1340, 1357 (11th Cir. 1982); and *United States v. Perez-Hernandez*, 672 F.2d 1380, 1385 (11th Cir. 1982).

The fair cross-section analysis is designed primarily to provide "jury review" as a buffer for the people from the abuses of government power. The emphasis is on the system rather than on the individual citizen. *See* Amar, *The Bill Of Rights As A Constitution*, 100 Yale L.J. 1131, 1182-89 (1991). The Sixth Amendment right to an "impartial jury" is given full effect by insuring that distinct groups of the community are represented, but are not given the opportunity

to dominate or, in the alternative, denied the opportunity to participate in a democratic system of justice. *United States v. Perez-Hernandez*, 672 F.2d at 1385. Neither of these purposes is offended when disproportionate representation is shown in the office of foreman on grand juries whose members were drawn from panels reflecting a fair cross-section of the community from which they were drawn, and the petitioner has not attacked the composition of the grand jury venire itself. *Peters v. Kiff*, 407 U.S. at 503-4.

The 11th Circuit has recognized:

> Accordingly, the fair cross-section analysis is only applicable to groups, such as a grand or petit jury, which can represent society as a whole. One person alone cannot represent the divergent views, experience, and ideas of the distinct groups which form a community. Thus, a grand jury foreman is a member of the group which represents a cross-section of his or her community, but he or she cannot be a fair cross-section of that community. Since we are not presented with a fair cross-section challenge to the entire venire of the grand jury below, we must affirm the trial court's ruling on this issue.

Perez-Hernandez, 672 F.2d at 1385, relying on *Taylor v. Louisiana*, 419 U.S. at 530 and *Peters v. Kiff*, 407 U.S. at 503.

Petitioner does not now or has he ever challenged the selection process of the grand jury which would be a *group* susceptible to a Sixth Amendment fair cross-section challenge. His challenge has always been to the selection process related to the single position of grand jury foreman. The mere selection of the foreman by the court in an allegedly discriminatory manner cannot alter the

representative character of the grand jury itself. This one position simply does not in any sense threaten or even implicate the interests of the petitioner protected by the Sixth Amendment. As a result, no Sixth Amendment right attaches to a challenge of the position of grand jury foreman.

CONCLUSION

Louisiana in no way condones race discrimination in the administration of criminal justice, in any corner. But to extend *Powers* to cover Terry Campbell's claim is, we respectfully submit, to substitute doctrinaire logic for practical wisdom.

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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NOTE: Petitioner Terry Campbell was indicted in 1992 and therefore, that version of the pertinent Louisiana law has been reproduced for this Court's convenience. Footnotes indicate any subsequent changes in the law.

APPENDIX A
Louisiana Revised Statutes, Title 14, Crimial Law Chapter 1, Part II, Offenses Against the Person, Subpart A. Homicide.

§ 30.1. Second degree murder

A. Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm;

B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. (Legislative history omitted.)

APPENDIX B
Louisiana Code of Criminal Procedure,
Title X. Instituting Criminal Prosecutions

Art. 382. Methods of instituting criminal prosecutions

A. A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. Other criminal prosecutions in a district court shall be instituted by indictment or by information. *Amended by Acts 1974, Ex.Sess. No. 19, § 1, eff. Jan. 1, 1975; Acts 1989, No. 8, § 1; Acts 1994, 3rd Ex.Sess., No. 83, § 1.*

Art. 383. Indictment

An indictment is a written accusation of crime made by a grand jury. It must be concurred in by not less than nine of the grand jurors, indorsed "a true bill," and the indorsement must be signed by the foreman. Indictment shall be returned into the district court in open court; but when an indictment has been returned for an offense which is within the trial jurisdiction of another court in the parish, the indictment may be transferred to that court.

APPENDIX C
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Art. 401. General qualifications of jurors

A. In order to qualify to serve as a juror, a person must:

(1) Be a citizen of the United states and of this state who has resided within the parish in which he is to serve as a juror for at least one year immediately preceding his jury service.

(2) Be at least eighteen years of age.

(3) Be able to read, write, and speak the English language and be possessed of sufficient knowledge of the English language.

(4) Not be under interdiction or incapable of serving as a juror because of a mental or physical infirmity, provided that no person shall be deemed incompetent solely because of the loss of hearing in any degree.

(5) Not be under indictment for a felony nor have been convicted of a felony for which he has not been pardoned.

B. Notwithstanding any provision in subsection A, a person may be challenged for cause on one or more of the following:

(1) A loss of hearing or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

(2) When reasonable doubt exists as to the competency of the prospective juror to serve as provided for in Code of Criminal Procedure Art. 787. *Amended by Acts 1972, No. 695, § 1; Acts 1984, No. 655, § 1.*

Art. 403. Exemption from jury service

Exemptions from jury service shall be as provided by rules of the Louisiana Supreme Court pursuant to Section 33(B) of Article V of the Louisiana Constitution of 1974. *Amended by Acts 1968, No. 108, § 1; Acts 1970, No. 450, §1; Acts 1972, No. 35, § 1; Acts 1972, No. 282, §1; Acts 1972, No. 523, § 1; Acts 1974, ex.Sess., No. 22, § 1, eff. Jan. 1, 1975.*

Art. 403.1 Disqualification for undue hardship

If the judge who presided over the impaneling of the grand jury finds that a grand juror can no longer serve without undue hardship, he may disqualify such juror and a substitute juror shall be selected in the same manner as for filling of a vacancy. *Added by Acts 1980, No. 467, § 1.*

Art. 404. Appointment of jury commission; term of office; oath; quorum; performance of function[1] in the parish of East Baton Rouge by the judicial administrator

Except in the parish of East Baton Rouge:

(1) The jury commission of each parish shall consist of five members, each having the qualifications set forth in Article 401.

(2) In Orleans Parish the jury commission shall be appointed by the governor, and the commissioners shall serve at his pleasure. In other parishes the jury commission shall consist of the clerk of court or a deputy clerk designated by him in writing to act in his stead in all matters affecting the jury commission, and four other persons appointed by written order of the district court, who shall serve at the court's pleasure.

(3) Before entering upon their duties, members of the jury commission shall take an oath to discharge their duties faithfully.

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[1] *[See 1992 version for A and B].* C. In the parish of Lafourche the function of the jury commission may be performed by the clerk of court of the parish of Lafourche or by a deputy clerk of court designated by him in writing to act in his stead in all matters affecting the jury commission. The clerk of court or his designated deputy shall have the same powers, duties, and responsibilities, and shall be governed by applicable provisions of law pertaining to jury commissioners. The clerk of court of the parish of Lafourche shall perform the duties and responsibilities otherwise imposed upon him by law with respect to jury venires, shall coordinate the jury venire process, and shall receive the compensation generally authorized for a jury commissioner. Amended by Acts 1993, No. 632 § 1.

(4) Three members of the jury commission shall constitute a quorum.

(5) Meetings of the jury commission shall be open to the public.

b In the parish of East Baton Rouge the function of the jury commission shall be performed by the judicial administrator of the Nineteenth Judicial district court or by a deputy judicial administrator designated by him in writing to act in his stead in all matters affecting the jury commission. The judicial administrator or his designated deputy shall have the same powers, duties and responsibilities, and be governed by those provisions of law as presently pertain to jury commissioners which are applicable, including the taking of an oath to discharge their duties faithfully. The clerk of court of the parish of East Baton Rouge shall perform the duties and responsibilities otherwise imposed upon him by law with respect to jury venires, shall coordinate the jury venire process, and shall receive the compensation generally authorized for a jury commissioner. *Amended by Acts 1975, No. 259, § 1.*

Art. 405. Notice of jury commission meetings

Each member of the jury commission shall be notified in writing of the time and place designated for a meeting of the commission, at least twenty-four hours prior to the meeting.

The notice shall be issued by one of the members or the secretary of the jury commission in Orleans Parish, and

by the clerk of court in all other parishes, and shall be served in the manner provided for service of subpoenas.

Art. 406. Powers of jury commission; penalty for disobedience of commission process

In order to secure qualified jurors, the jury commission may issue subpoenas to compel the attendance of witnesses and the production of evidence relative to the qualifications of prospective jurors.

Disobedience of a subpoena of a jury commission is punishable as contempt of court.

Art. 407. Administration of oath to witnesses

A jury commissioner shall administer an oath to each witness appearing before the commission, in accordance with Article 14.

Art 408. Selection of general venire in parishes other than Orleans

A. In parishes other than Orleans, the jury commission shall select impartially at least three hundred persons having the qualifications to serve as jurors, who shall constitute the general venire. A list of persons so selected shall be prepared and certified by the clerk of court as the general venire list, and said list shall be kept as part of the records of the commission. The name and address of each person on the list shall be written on a separate slip of paper, with no designation as to race or color, which shall be placed in a box labeled "General Venire Box."

B. After the jury commission has selected the general venire, it shall lock and seal the general venire box and deliver it to the clerk of court, as the custodian thereof. Alternatively, the list of persons so selected may be retained in a form suitable for use by a properly programmed electronic device commonly known as a computer.

C. The jury commission shall meet at least once every six months and when ordered by the court, and may meet at any time to select or supplement the general venire. The commission may select a new general venire at any meeting and shall do so when ordered by the court. *Amended by Acts 1968, No. 140, § 1; Acts. 1972, No. 755, §1.*

Art. 410. Revising and supplementing the general venire

At each commission meeting to revise and supplement the general venire, the commission shall examine the general venire list prepared at the previous selection of the general venire and shall delete therefrom the names of those persons who:

(1) Have served as civil or criminal jurors since the previous selection of the general venire; or

(2) Are known to have died or who have become disqualified to serve as jurors since their selection on the general venire.

The slips bearing the names of those persons deleted from the general venire list shall be removed from the general venire box.

The commission shall then supplement the list prepared at the previous commission meeting and the

corresponding slips in the box by selecting a sufficient number of additional persons in compliance with Article 408 or Article 409, whichever is applicable. Where the general venire list is maintained in a form suitable for use by an electronic device commonly known as a computer, the general venire shall likewise as hereinabove provided be deleted and supplemented. *Amended by Acts 1972, No. 755, § 1.*

Art. 411. Drawing of grand jury venire in parishes other than Orleans; disposition of slips; jury box; subpoena of persons on grand jury venire

A. Upon order of the court the jury commission in parishes other than Orleans shall select by drawing indiscriminately and by lot from the general venire box the names of at least twenty but not more than one hundred persons, with the number to be specified by the court in its order, who shall constitute the grand jury venire. Alternatively, the grand jury venire may be drawn with the use of a properly programmed electronic device commonly known as a computer. A grand jury venire shall not be drawn from a general venire containing fewer than three hundred names.

B. The slips containing the names of the persons so drawn shall be placed in an envelope which shall be sealed and the words "Grand Jury Venire: written thereon.

C. The sealed envelope shall be placed in a box labeled "Grand Jury Box:, which shall be locked and sealed and placed in the custody of the clerk of court for use at the next term of court, subject to the orders of the district court, as hereinafter provided.

D. (1) The clerk shall prepare subpoenas directed to the persons on the grand jury venire, ordering their appearance in court on the date set by the court for the selection of the grand jury, and shall deliver the subpoenas to the sheriff for service.

(2) The sheriff, at the election of the district judges of the judicial district in which the parish lies, may serve such subpoenas by:

(a) Personal or domiciliary service, or by registered, certified, or regular mail addressed to the juror at his usual residence or business address.

(b) When the service is by mail, the date of mailing shall be not less than fifteen days prior to the date on which the addressee is subpoenaed to appear.

(c) When service is by registered or certified mail, the sheriff shall attach to his return the return receipt of delivery from the United States Post Office showing the disposition of the envelope bearing the summons to the juror.

(d) When service is by regular mail, the return shall show the date of mailing. In case of service by regular mail, prior to any contempt citation, the person shall be served by registered or certified mail with return receipt requested.

(3) The return, with the attached return receipt of delivery, when received by the clerk, shall form part of the record and shall be considered prima facie correct and shall constitute sufficient basis for an action to cite persons for contempt for failure to appear in response thereto. *Amended*

by Acts 1968, No. 141, § 1; Acts 1970, No. 297, § 1; Act 1972, No. 755, § 1; Acts 1977, No. 552, § 1; Acts 1987, No. 281, § 1.

Art. 413. Method of impaneling of grand jury; selection of foreman

A. The grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors, selected or drawn from the grand jury venire.

B. In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filing vacancies as provided in Article 415.

C. In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.

D. The first and second alternates shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415. *Amended by Acts 1990, No. 47, § 1.*

Art. 414. Time for impaneling grand juries; period of service

A. A grand jury shall be impaneled twice a year in each parish, except in the parish of Cameron in which at least one grand jury shall be impaneled each year.

B. In parishes other than Orleans, the court shall fix the time at which a grand jury shall be impaneled, but no grand jury shall be impaneled for more than eight months, nor less than four months, except in the parish of Cameron in which the grand jury may be impaneled for a year.

C. In Orleans Parish, a grand jury venire shall be drawn by the jury commission on the date set by the presiding judge. On the next legal day following the drawing, the jury commission shall submit the grand jury venire to the presiding judge, who shall impanel the grand jury. A grand jury in Orleans Parish shall be impaneled on the first Wednesday of March and September of each year.

D. A grand jury shall remain in office until a succeeding grand jury is impaneled. A court may not discharge a grand jury or any of its members before the time for the impaneling of a new grand jury, except for legal cause. *Amended by Acts 1985, No. 675, § 1.*

Art. 415. Method of filling vacancies on grand jury

A. When a vacancy occurs on a grand jury, the court shall fill the vacancy as follows:

(1) In parishes other than Orleans, by administering the oath to and seating the first alternate if he is still legally qualified and available, or if he is not, by administering the oath to and seating the second alternate, if still legally qualified and available. If a vacancy occurs after the second alternate has been seated on the grand jury to fill a vacancy or if the second alternate cannot be seated, the vacancy shall be filled by ordering the sheriff to draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. If the names in the envelope be exhausted before the grand jury is completed, or if a vacancy occurs on the grand jury and no names remain in the envelope, the court shall order the jury commission to withdraw indiscriminately and by lot from the general venire box an additional number of names sufficient to complete the grand jury.

(2) In Orleans Parish, by administering the oath to and seating the first alternate if he is still legally qualified and available, or if he is not, by administering the oath to and seating the second alternate, if still legally qualified and available. If a vacancy occurs after the second alternate has been seated to fill a vacancy or if the second alternate cannot be seated, the vacancy shall be filled by ordering the jury commission to draw indiscriminately and by lot from the general venire box twelve or more names, as specified by the court, from which the court shall select the persons necessary to fill the vacancy.

B. If the foreman of the grand jury is, for any reason, unable to act, the court shall designate some member of the grand jury to serve as acting foreman or to serve as a new foreman of that grand jury. An acting foreman has the powers and duties of the foreman. *Amended by Acts 1990, No. 47, § 1.*

Art. 415.1. Selection of additional grand juries

Upon the request of the district attorney, the court shall order one additional grand jury to be impaneled. Such additional grand jury shall be selected in the same manner and have the same qualifications, duties, powers, and responsibilities, and be subject to the same provisions of law which presently govern grand juries, except as to duration and the duty to inspect facilities as provided by R.S. 15:121. However, no grand jury may concurrently conduct an inquiry into any offense or matter or receive evidence of any offense or matter which is under investigation by another grand jury impaneled in the same parish. This additional grand jury shall be impaneled and presided over by the judge who impaneled the existing regular grand jury or a judge appointed by him to act in his absence. *Added by Acts 1975, Ex.Sess. No. 45, § 1, eff. Feb. 20, 1975. Amended by Acts 1975, No. 569, § 1; Acts 1980, No. 467, § 1; Acts 1990, No. 74, § 1.*

Art. 415.2. Duration of additional grand juries; extension of impanelment

Grand juries impaneled in accordance with Article 415.1 shall remain impaneled for a period not to exceed one year unless discharged sooner by the court upon motion of the district attorney. Provided, however, that prior to the discharge of a grand jury by the court, a grand jury shall return its report on all offenses and matters presented or pending before it as authorized by the provisions of Article 444. Upon the request of the district attorney, the court may extend this time limit for an extra six months. *Added by Acts 1975, Ex.Sess., No. 45, § 1, eff. Feb. 20, 1975. Amended by Acts 1975, No. 569, § 1.*

Art. 416.1. One-step qualification/summoning

A. In parishes other than Orleans, at the election of the judges of the judicial district in which the parish lies, the qualification questionnaire, subpoena, and return envelope for each person who may be selected for the petite jury venire shall be prepared by the clerk and delivered in the same computer-generated envelope to the sheriff for service. The sheriff may serve such questionnaire and subpoena by first class mail addressed to such person at his usual residence or business address. The subpoena shall state an appearance date for such person not later than three weeks after the date on which the questionnaire is to be returned.

B. The questionnaire shall contain a section for signature to acknowledge receipt of the accompanying subpoena. The addressee of the subpoena and questionnaire shall fill out, sign, and return the questionnaire in the return envelope by first class mail, within five days of receipt thereof. The signing of the questionnaire shall constitute acknowledgment of receipt of the subpoena and personal service of the subpoena on the addressee.

C. The questionnaire may constitute part of the sheriff's return and may be made part of the record. When served in accordance with this Section, a person may be cited for contempt for failing to appear in response to the subpoena. *Added by Acts 1982, No. 701, § 1.*

Art. 417. Proces verbal; summoning of petit jurors; parishes other than Orleans

A. In parishes other than Orleans, the clerk of court shall make a proces verbal of the selection of the general venire and of the drawing of the grand jury venire and of the

petite jury venire. It shall be certified to by a member of the commission and shall be filed in the clerk's office as a public record.

The clerk shall make a list of the names on the grand jury venire and on the petit jury venire, showing the week for which each petit jury venire is to service. The lists, together with the general venire list, shall be a part of the proces verbal.

B. The clerk shall cause a copy of the petit jury venire list and grand jury venire list to be published in the official journal of the parish, if there be one, or in some other newspaper published in the parish, or if there is no official journal or other newspaper in said parish, he shall post a copy of the lists on the door of the courthouse.

C. (1) The clerk shall prepare subpoenas directed to the persons on the petit jury venire and deliver them to the sheriff for service.

(2) The sheriff, at the election of the district judges of the judicial district in which the parish lies, may serve such subpoenas by:

(a) Personal or domiciliary service, or by registered, certified, or regular mail addressed to such juror at his usual residence or business address.

(b) When the service is by mail, the date of mailing shall not be less than fifteen days prior to the date on which the addressee is subpoenaed to appear.

(c) When service is by registered or certified mail, the sheriff shall attach to his return the return receipt of

delivery from the United States Post Office showing the disposition of the envelope bearing the summons to the juror.

(d) When service is by regular mail, the return shall show the date of mailing. In case of service by regular mail, prior to any contempt citation, the person shall be served by registered or certified mail with return receipt requested.

(3) The return, with the attached return receipt of delivery, when received by the clerk, shall form part of the record and shall be considered prima facie correct and shall constitute sufficient basis for an action to cite persons for contempt for failure to appear in response thereto. *Amended by Acts 1972, No. 755, § 1; Acts 1987, No. 281, § 1.*

Art. 419. Challenge of venire not permitted except for fraud or irreparable injury or systematic exclusion based on race.

A. A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race.

B. this Article does not affect the right to challenge for cause, a juror who is not qualified to service. *Amended by Acts 1987, No. 638, § 1.*

APPENDIX D
Louisiana Code of Criminal Procedure, Title XII. The Grand Jury

Art. 431. Oath of grand jury

The grand jurors shall take the following oath when impaneled:

"As members of the grand jury, do you solemnly swear or affirm that you will diligently inquire into and true presentment make of all indictable offenses triable within this parish which shall be given you in charge, or which shall otherwise come to your knowledge; that you will keep secret your own counsel and that of your fellows and of the state, and will not, except when authorized by law, disclose testimony of any witness examined before you, nor disclose anything which any grand juror may have said, or how any grand juror may have voted on any matter before you; that you will not indict any person through malice, hatred, or ill will, nor fail to indict any person through fear, favor, affection, or hope of reward or gain; but in all of your indictments you will present the truth, according to the best of your skill and understanding?"

The oath shall be read to the grand jury by the clerk, who shall then ask each juror: "Do you take this oath or affirmation?:

The oath shall be administered to every grand juror appointed to fill a vacancy in the grand jury and to every grand juror who was not present at the taking of the oath by the grand jury.

Art. 432. Charge to grand jury

After the oath is administered to the members of the grand jury, the judge shall charge them orally in open court upon their duties, rights, and powers. Upon completion of the charge the judge shall give the grand jury a written copy of the charge.

At any time thereafter, the judge, on his own initiative or on request of the grand jury, may give the grand jury additional charges concerning their duties, rights, and powers. Such additional charges shall be given in open court, and a written copy thereof shall thereafter be given to the grand jury.

Art. 433. Persons present during grand jury sessions[2]

A. (1) Only the following persons may be present at the sessions of the grand jury:

(a) The district attorney and assistant district attorneys or any on or more of them;

(b) The attorney general or an assistant attorney general;

(c) The witness under examination;

(d) A persons sworn to record the proceedings of and the testimony given before the grand jury; and

(e) An interpreter sworn to translate the testimony of a witness who is unable to speak the English language.

(2) An attorney for a target of the grand jury's investigation may be present during the testimony of said target. The attorney shall be prohibited from objecting, addressing or arguing before the grand jury; however he may

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2. A. (1) Only the following persons may be present at the sessions of the grand jury: *[See 1992 version for (a)]*; (b) The attorney general and assistant attorneys general or any one of the; *[See 1992 version for (c) to (e)]*. (2) An attorney for a target of the grand jury's investigation may be present during the testimony of said target. The attorney shall be prohibited from objecting, addressing or arguing before the grand jury; however he may consult with his client at anytime. The court shall remove such attorney for violation of these conditions. If a witness becomes a target because of his testimony, the legal advisor to the grand jury shall inform him of his right to counsel and cease questioning until such witness has obtained counsel or voluntarily and intelligently waived his right to counsel. Any evidence or testimony obtained under the provisions of this Subparagraph from a witness who later becomes a target shall not be admissible in a proceeding against him. *[See 1992 version for B and C]*. Amended by Acts 1992, No. 308 § 1.

consult with his client at anytime. The court shall remove such attorney for violation of these conditions. If a witness becomes a target because of his testimony, the legal advisor to the grand jury shall inform him of his right to counsel and cease questioning until such witness has obtained counsel or voluntarily and intelligently waived his right to counsel. Any evidence or testimony obtained under the provisions of this Subparagraph from a witness who later becomes a target shall not be admissible in a proceeding against him.

B. No person, other than a grand juror, shall be present while the grand jury is deliberating and voting.

C. A person who is intentionally present at a meeting of the grand jury, except as authorized by Paragraph A of this article, shall be in constructive contempt of court. *Amended by Acts 1972, No. 409, §1; Acts 1986, No. 725, § 1.*

Art. 434. Secrecy of grand jury meetings; procedures for crimes in other parishes

A. Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. However, after the indictment, such persons may reveal statutory irregularities in grand jury proceedings to defense counsel, the attorney general, the district attorney, or the court, and may testify concerning them. Such persons may disclose testimony given before the grand jury, at any time when permitted by the court, to show that a witness committed perjury in his testimony before the grand jury. A witness may discuss his testimony given before the grand jury with counsel for a person under investigation

or indicted, with the attorney general or the district attorney, or with the court.

B. Whenever a grand jury of one parish discovers that a crime may have been committed in another parish of the state, the foreman of that grand jury, after notifying his district attorney, shall make that discovery known to the attorney general. The district attorney or the attorney general may direct to the district attorney of another parish any and all evidence, testimony, and transcripts thereof, received or prepared by the grand jury of the former parish, concerning any offense that may have been committed in the latter parish, for use in such latter parish.

C. Any person who violates the provisions of this article shall be in constructive contempt of court. *Amended by Acts 1972, no. 450, § 1.*

Art. 435. Meetings of grand jury

The grand jury shall meet as directed by the court, or may meet on its own initiative at the direction of nine of its members, at any time and place within the parish. Nine grand jurors shall constitute a quorum, and nine grand jurors must concur to find an indictment. *Amended by Acts 1975, Ex.Sess., No. 45, § 2, eff. Feb. 20, 1975.*

Art. 436. The foreman; rules of procedure

The foreman of the grand jury shall preside over all hearings. He may delegate duties to other grand jurors and may determine rules of procedure. A grand juror who objects to a rule of procedure made by the foreman may apply to the court for a determination of the matter.

Art. 437. Inquiry into offenses; authority and duties

The grand jury shall inquire into all capital offenses triable within the parish. It may inquire into their offenses triable by the district court of the parish, and shall inquire into such offenses when requested to do so by the district attorney or ordered to do so by the court.

Art. 438. Duty of grand juror having knowledge of offense; investigation

If a grand juror knows or has reason to believe that an offense triable by the district court of the parish has been committed, he shall declare such fact to his fellow jurors, who may investigate it. In such investigation or any subsequent criminal proceeding the grand juror shall be a competent witness.

Art. 439. Subpoena of witnesses to appear before the grand jury

Upon request of the grand jury or the district attorney, the court shall issue a subpoena for a witness to appear before the grand jury to testify when questioned by the grand jury or district attorney, or both, concerning an offense under investigation. Upon request of the grand jury or the district attorney, the court may also issue a subpoena duces tecum. The issuance, service, and return of a subpoena provided for in this article and the effect of the return and the enforcement of the subpoena shall be as provided in Articles 731 through 737.

Art. 439.1. Witnesses; authority to compel testimony and evidence

A. In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury of the state, at any proceeding before a court of this state, or in response to any subpoena by the attorney general or district attorney, the judicial district court of the district in which the proceeding is or may be held shall issue, in accordance with subsection B of this article, upon the request of the attorney general together with the district attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in subsection C of this article.

B. The attorney general together with the district attorney may request an order under subsection A of this article when in his judgment

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self incrimination.

C. The witness may not refuse to comply with the order on the basis of his privilege against self incrimination, but no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

D. Whoever refuses to comply with an order as hereinabove provided shall be adjudged in contempt of court and punished as provided by law. *Added by Acts 1972, No. 410, § 1.*

Art. 440. Administration of oath to witness

A witness who is to testify before the grand jury shall first be sworn by the foreman, in accordance with Article 14, to testify truthfully and to keep secret, except as authorized by law, matters which he learns at the grand jury meeting. *Amended by Acts 1988, No. 515, § 3, eff. Jan. 1, 1989.*

Art. 441. Administration of oath to other persons

Before being permitted to function in their respective capacities, the court shall administer an oath, to persons employed to record and transcribe the testimony and proceedings, and to interpreters, to faithfully perform their duties and keep secret the grand jury proceedings.

Art. 443. When indictment to be found

The grand jury shall find an indictment, charging the defendant with the commission of an offense, when, in its judgment, the evidence considered by it, if unexplained and uncontradicted, warrants a conviction.

Art. 444. Action by grand jury

A. A grand jury shall have power to act, concerning a matter, only in one of the following ways:

(1) By returning a true bill;

(2) By returning not a true bill; or

(3) By permitting entirely the matter investigated.

The grand jury is an accusatory body and not a censor of public morals. It shall make no report or recommendation, other than to report is action as aforesaid.

B. At least nine members of the grand jury must concur in returning "a true bill" or "not a true bill." A matter may be pretermitted by a vote of at least nine members of the grand jury, or as a consequence of the failure of nine of the grand jury members to agree on a finding.

C. A grand jury may make such reports or requests as are authorized by law.

APPENDIX E
Louisiana Code of Criminal Procedure
Title XV. Motion To Quash

Art. 533. Special grounds for motion to quash grand jury indictment

A motion to quash an indictment by a grand jury may also be based on one or more of the following grounds:

(1) The manner of selection of the general venire, the grand jury venire, or the grand jury was illegal.

(2) An individual grand juror was not qualified under Article 401.

(3) A person, other than a grand juror, was present while the grand jurors were deliberating or voting, or an unauthorized person was present when the grand jury was examining a witness.

(4) Less than nine grand jurors were present when the indictment was found.

(5) The indictment was not indorsed "a true bill," or the endorsement was not signed by the foreman of the grand jury.

APPENDIX F
The Constitution of the United States of America, Article III.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX G
The Constitution of the State of Louisiana of 1974 Article I. Declaration of Rights.

§ 15. Initiation of Prosecution

Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury. No person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.

(5)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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OCTOBER TERM 1997

No. 96-1584

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

This brief *amicus curiae* is submitted in support of Petitioner Terry Campbell. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to

the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among the NACDL's stated objectives is the

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

promotion of the proper administration of criminal justice, which includes the participation of all segments of the community in the criminal justice system via jury service on petit and/or grand juries, and the concurrent elimination of any policies of exclusion of any groups from that participation.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of petitioner's claim that he possesses standing to challenge the systematic exclusion of blacks from the position of grand jury foreperson in the state of Louisiana even though he is not a member of the excluded class.

STATEMENT

Amicus adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

In *Taylor v. Louisiana*, 419 U.S. 522, 535-36 (1975), this Court, in holding that "exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community[,]" noted that while "this judgment may appear a foregone conclusion from the pattern of some of the Court's cases over the past 30 years . . . no case had squarely held" that such exclusion constituted a constitutional violation.

Here, the result is also a "foregone conclusion" based on what is now more than 50 years of this Court's cases, and is open only because the issue has not been squarely addressed by this Court. Indeed, all of the cases on the subject of jury venire exclusion support petitioner's claim: that an Equal Protection or "fair cross section" challenge to the systematic exclusion of blacks from the position of grand jury foreperson in the State of Louisiana may be instituted by a white defendant.

For example, this Court has already held that a defendant may make an Equal Protection challenge to the exclusion of a particular group from a petit jury regardless whether the defendant is the same race as the excluded group. In addition, this Court has extended the principles of Equal Protection to the composition of the grand jury as well.

Similarly, this Court has already held that the race of the defendant is immaterial in the context of a Sixth Amendment "fair cross section" claim with respect to the composition of a petit jury. Again, the "fair cross section" protections have been extended to the grand jury, too.

Thus, all that remains is the application of these postulates to the position of foreman of the grand jury in the State of Louisiana, a proposition which this Court has, in the context of a Tennessee state court case, already assumed without deciding. Permitting any defendant, regardless of his or her race, to institute Equal Protection

and "fair cross section" challenges to the exclusion of a particular group from serving as grand jury forepersons is simply the logical, necessary, and inexorable application of this Court's prior caselaw.

In ruling to the contrary, the Louisiana Supreme Court failed to recognize the clear line established by this Court, and instead misapplied another decision by this Court that is entirely distinguishable from this case. In fact, the case upon which the Louisiana Supreme Court relied was not even a case involving standing; nor did it even involve an Equal Protection or "fair cross section" claim.

Accordingly, *amicus* respectfully submits that the decision of the Louisiana Supreme Court should be reversed, and Petitioner's conviction vacated.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT PETITIONER LACKED STANDING TO CHALLENGE THE EXCLUSION OF A PARTICULAR CLASS FROM THE POSITION OF GRAND JURY FOREPERSON BECAUSE HE WAS NOT A MEMBER OF THE EXCLUDED CLASS

As noted above, that the question presented for review in this case has not been answered directly by this Court, in light of all of this Court's decisions addressing closely related issues, is simply because the precise question has not been previously considered by this Court.

As detailed below, each of this Court's opinions in cases involving closely analogous questions supports the adoption of petitioner's position: that under either the Equal Protection Clause of the Fourteenth Amendment, or the "fair cross-section" guarantee embodied in the Sixth Amendment, a defendant possesses standing to challenge the racial composition of grand jury forepersons regardless whether the group excluded is of the same race as the defendant.

In general, the notion that a constitutional claim of exclusion of a particular class from jury service must be raised by a defendant who is a member of that excluded class has been flatly rejected by this Court. In *Peters v.*

Kiff, 407 U.S. 493 (1972), six Justices of this Court found that a white defendant could raise a claim due to the exclusion of blacks from both the petit jury and grand jury. 407 U.S. at 498-99, 505-07.

Justices Marshall, in an opinion joined by Justices Douglas and Stewart, stated that "when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim." 407 U.S. at 498.

The opinion pointed out that any objection to defendant's standing "takes too narrow a view of the kinds of harm that flow from discrimination in jury selection." 407 U.S. at 498. Citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), this Court explained that "the exclusion of Negroes from the jury service injures not only defendants, but also other members of the excluded class[,]" since it "denies the class of potential jurors the 'privilege of participating equally . . . in the administration of justice,' . . . and it stigmatizes the whole class[.]"

Justice White, joined by Justices Brennan and Powell, also expressly allowed the white petitioner in *Peters* to "challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him." 407 U.S. at 507.

A. *Petitioner Has Standing to Make An Equal Protection Challenge*

In *Castaneda v. Partida*, 430 U.S. 482, 492-93 (1977), this Court held that a criminal defendant may attack a conviction on the ground of an Equal Protection violation against an identifiable group in the composition of the grand jury.

Subsequently, in *Powers v. Ohio*, 499 U.S. 400 (1991), this Court held explicitly that standing to bring an Equal Protection challenge to the exclusion of a class of jurors did not require identity between the race of the defendant and that of the excluded class.

In ruling that a white defendant possessed standing to object to peremptory challenges exercised against blacks, this Court described its holding as stating that "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." 499 U.S. at 416.

This Court upheld the defendant's standing to make an Equal Protection claim in *Powers* "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' *Rose v. Mitchell*, 443 U.S. 545 [ ] (1979), and places the fairness of a criminal proceeding in doubt." 499 U.S. at 411.

Likewise, in *Vasquez v. Hillery*, 474 U.S. 254

(1986), this Court reaffirmed that the principles of Equal Protection apply in the grand jury with the same force as they do at trial. *See also Rose v. Mitchell, supra*, 443 U.S. at 556.

Accordingly, it is the clear mandate of this Court that a defendant need not be of the same race as the excluded class to possess standing to institute an Equal Protection challenge to the exclusion of that class from grand jury service.

B. *Petitioner Has Standing to Make A "Fair Cross Section" Challenge*

The same is true with respect to a claim made pursuant to the constitution's "fair cross section" guarantee. In *Taylor v. Louisiana*, *supra*, and again in *Duren v. Missouri*, 439 U.S. 357 (1979), this Court held that "[a] criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class." 439 U.S. at 359 n. 1, *citing Taylor*, 419 U.S. at 526.

In *Taylor*, the Court pointed out that "there is no rule that claims such as [the defendant] presents may be made only by those defendants who are members of the group excluded from jury service." 419 U.S. at 526. Thus, in both *Taylor* and *Duren*, a male defendant had standing to challenge the exclusion of women from a petit jury.

Also, as is the case with the Equal Protection clause, the "fair cross section" guarantee applies in the grand jury as well. *See United States v. Osorio*, 801 F. Supp. 966, 972-74 (D. Conn. 1992); *United States v. Biaggi*, 680 F. Supp. 641, 653-55 (S.D.N.Y. 1988), *aff'd*, 909 F.2d 662 (2d Cir.), *cert. denied*, 499 U.S. 904 (1990); *United States v. Gerena*, 677 F. Supp. 1266, 1272 (D. Conn. 1986), *aff'd sub nom. United States v. Maldonado-Rivera*, 922 F.2d 934, 970 (2d Cir. 1990), *cert. denied*, 501 U.S. 1233 (1991).

In *Biaggi*, *supra*, the District Court noted that "[a]lthough the sixth amendment's fair-cross-section test applies, strictly speaking, only to petit juries, the Supreme Court has banned, under the due process clause of the fifth amendment, exclusion of any 'large and identifiable segment of the community' from either grand or petit juries. 680 F. Supp. at 653, *citing Peters v. Kiff*, *supra*, 419 U.S. at 526.

Indeed, in *Peters v. Kiff*, *supra*, while this Court did not resolve the "fair cross section" issue because in that case the petitioner's trial had occurred before the Sixth Amendment's petit jury clause was made binding on the states [via *Duncan v. Louisiana*, 391 U.S. 145 (1968)], this Court did note that

> if the Sixth Amendment were applicable here, and petitioner were challenging a post-*Duncan* petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service.

407 U.S. at 500 (footnote omitted).[2]

The basis for the Court's conclusion applies with equal force to grand juries: "the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." *Id.*

Thus, under either the Sixth Amendment, or the Due Process clause of the Fifth Amendment, the requirement of a "fair cross section" applies to grand juries. Otherwise, all of protections afforded in the context of the composition of a trial jury would be rendered meaningless, since, as this Court stated in *Taylor v. Louisiana*, *supra*,

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[2] In *Peters v. Kiff*, *supra*, this Court also noted that the "fair cross section" evolved from Equal Protection jurisprudence. 407 U.S. at 500 n. 9. As a result, logic dictates that the "fair cross section" guarantee, like the Equal Protection Clause from which it derived, applies to both petit and grand juries.

> [c]ommunity participation in the administration of criminal law [] is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

419 U.S. at 530.

Denying that essential "community participation" at the grand jury level, in the form of a "fair cross section," is as repugnant as it is in the context of a petit jury.

C. *Petitioner Has Standing to Challenge the Exclusion of Black Grand Jury Forepersons*

Since, as set forth above, this Court's prior cases clearly hold that Petitioner, regardless of his race in relation to the race of the excluded class, has standing to institute either an Equal Protection or "fair cross section" challenge to the grand jury, it remains only to apply that jurisprudence to the exclusion of blacks from the role of foreperson of a Louisiana state grand jury.

Faced with a challenge by black defendants to the exclusion of blacks from the position of foreperson of Tennessee state grand juries, this Court, in *Rose v. Mitchell*, *supra*, noted that it would

> assume without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire.

443 U.S. at 551 n. 4 (citation omitted).[3]

However, the Court did reaffirm its previously principles, namely that

> [b]ecause discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, the Court has recognized that a criminal defendant's right

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[3] The Court did not have to decide the issue because it found that petitioners in *Rose v. Mitchell* failed to present a *prima facie* case of discrimination in violation of the Equal Protection Clause with respect to the selection of grand jury forepersons. 443 U.S. at 574.

> to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded.

443 U.S. at 556

That protection against exclusion includes the selection of the grand jury foreperson. Indeed, in *Guice v. Fortenberry*, 722 F.2d 496 (5th Cir. 1981), the Fifth Circuit reasoned that "[i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination affecting only the foreman." 722 F.2d at 499. Consequently, the Fifth Circuit granted the habeas corpus petitions of two defendants because of the discriminatory selection of grand jury forepersons in the very same state of Louisiana, Respondent herein.[4]

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[4] The result in *Guice*, and the fact that racial discrimination in the selection of grand jury forepersons persists in Louisiana to this day, provides a perfect illustration of why defendants, regardless of their race, have standing to challenge the exclusion of identifiable classes from jury service, since obviously, in the seventeen years since *Guice*, the excluded class itself has not pursued any challenge to the discriminatory practice. *See, e.g., Powers v. Ohio*, 499 U.S. at 414-15 ("[t]he reality is that juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights") (citation omitted).

Nor does any decision by this Court hold or even suggest otherwise.[5] In fact, the Louisiana Supreme Court's reliance on this Court's decision in *Hobby v. United States*, 468 U.S. 339 (1984), is completely misplaced, since *Hobby*, in which this Court held that discrimination in the selection of federal grand jury forepersons did not deny the defendant Due Process, is entirely distinguishable in three dispositive respects:

(1) *Hobby* was not a standing case; instead, as this Court pointed out, "[t]he question presented . . . is the narrow one of the appropriate remedy for such a violation[]" of the proscription against racial discrimination in the selection of federal grand jury forepersons, 468 U.S. at 342;

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[5] The Fifth Circuit's decision in *United States v. Cronn*, 717 F.2d 164, 169 (5th Cir. 1983), that "equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the judicial process as it is applied to him[,]" is, in light of *Powers v. Ohio*, *supra* (decided subsequently), plainly wrong.

(2) the petitioner in *Hobby* grounded his claim on the Due Process Clause only, a fact stressed by this Court, 468 U.S. at 347, which thereby distinguished *Hobby* from the Equal Protection claims raised in *Rose v. Mitchell, supra*. Thus, neither the Equal Protection nor "fair cross section" guarantees were implicated in *Hobby*;

(3) this Court's conclusion in *Hobby* – that the post of foreperson in the federal grand jury "cannot be said to have a significant impact upon the due process interests of criminal defendants[,]" *id.* – was premised on the finding that the foreperson in the federal grand jury possesses merely "ministerial powers . . . [and] performs strictly clerical tasks" (in contrast with the substantive role of the Tennessee state grand jury foreperson at issue in *Rose v. Mitchell, supra*). 468 U.S. at 348. Here, the system is much more like that in *Rose v. Mitchell* than its federal counterpart. Under Louisiana law, (in parishes other than Orleans) the foreperson is chosen by the court from the grand jury venire, and not from the already empaneled grand jury, as in federal system. *See* Louisiana Code of Criminal Procedure, Article 413. Thus, since the judge in Louisiana selects a

voting member of the grand jury (as the Tennessee court did in *Rose v. Mitchell*), Louisiana's grand jury forepersons are governed by the standards applied in *Rose v. Mitchell*.[6]

As a result, *Hobby* does not in any way defeat Petitioner's claim, which is fully consistent with the principles underlying this Court's repeated efforts at eradicating discrimination in jury selection, whether it be in a petit or grand jury. As this Court stated in *Powers v. Ohio, supra*, it has "not questioned the premise that racial discrimination in the qualification of jurors offends the dignity of persons and the integrity of the courts." 499 U.S. at 402.

In light of that simple but fundamental principle, which applies at each stage of selection, and to each juror

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[6] In light of the more substantive role played by the grand jury forepersons in Louisiana (than that found insufficient in *Hobby*), and the position of three Justices in *Peters v. Kiff, supra* that grand jury selection was protected by the Due Process Clause, Petitioner here also has standing to raise a Due Process challenge to the discriminatory selection of grand jury forepersons. However, if the Court sustains Petitioner's standing under either the Equal Protection Clause or the "fair cross section " guarantee, it need not reach the Due Process issue.

chosen, this Court explained in *Powers* that "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." 499 U.S. at 415.

The same would be true here if the Louisiana Supreme Court's decision that Petitioner lacked standing to challenge the exclusion of blacks from the position of grand jury foreperson were affirmed. As a result, *amicus* respectfully submits that the decision of the Louisiana Supreme Court must be reversed, and Petitioner's conviction vacated.

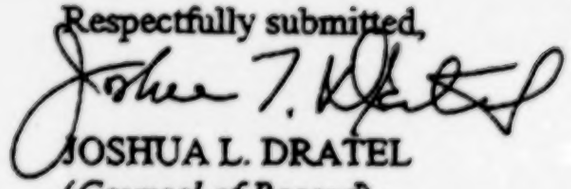
CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that the decision of the Louisiana

Supreme Court should be reversed, and petitioner's conviction vacated.

Dated: 19 November 1997
New York, New York

Respectfully submitted,



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